

## Chapter 2

---

# The Legal System

*'The common law system has served Hong Kong well in the past and will continue to do so in the future. The common law and its operation are ultimately founded on fairness and justice being administered for the benefit of the community and its people.' – Chief Justice, Mr Geoffrey Ma, at the Ceremonial Opening of the Legal Year 2013*

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 Basic Law

The constitutional framework of the HKSAR is provided 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.

Since the establishment of the HKSAR, legal arguments based on the Basic Law have been raised in a wide variety of cases. The gradual development of a body of jurisprudence on the Basic Law reinforces its effectiveness in determining the rights, freedoms, powers and obligations guaranteed to the people of Hong Kong.

### Continuation of the Legal System

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 1 July 1997.

The laws in force in Hong Kong before 1 July 1997 continue to apply in the HKSAR except for those which contravened the Basic Law. Some legislation was adapted to bring it into line with the Basic Law and to reflect Hong Kong's new status as a Special Administrative Region of the PRC.

The existing courts and tribunals were re-established on 1 July 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 1 July 1997. Furthermore,

pursuant to the Basic Law, judges from other common law jurisdictions may be invited to sit on the Court of Final Appeal.

### Law in the HKSAR

The laws in force in the HKSAR are:

- (a) the Basic Law;
- (b) national laws listed in Annex III to the Basic Law (there are currently 12 such laws), as applied to the HKSAR by way of promulgation or legislation;
- (c) the laws in force before 1 July 1997 (including the common law, rules of equity and customary law as well as statutory law), other than those not adopted as laws of the HKSAR by the NPC's Standing Committee because they contravene the Basic Law; and
- (d) laws enacted by the HKSAR's legislature.

National laws that may be added to Annex III to the Basic Law are confined to those relating to defence and foreign affairs, as well as other matters outside the HKSAR's autonomy.

All legislation in force in the HKSAR is bilingual, and the Chinese and English texts are equally authentic. All legislation is published in a hard-copy loose-leaf edition and is also available for free reference on the internet at [www.legislation.gov.hk](http://www.legislation.gov.hk). With the enactment of the Legislation Publication Ordinance in 2011, preparation is now under way for the establishment of a new electronic legislation database with legal status.

### Legal Protection for Rights of the Individual

Chapter III of the Basic Law prescribes the fundamental rights and freedoms of Hong Kong residents. In particular, Article 39 provides that the provisions of the International Covenant on Civil and Political Rights (ICCPR), 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 against discrimination 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, which is administered by the Privacy Commissioner for Personal Data, protects the right to privacy with respect to personal data.

### United Nations Human Rights Treaties

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, the Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, 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 states parties to submit periodic reports and other information requested to the United Nations (UN) treaty monitoring bodies. With the exception of the ICCPR, which does not apply to Mainland China, the HKSAR submits these reports as part of corresponding reports submitted by China and the HKSAR teams attend hearings of relevant treaty bodies as part of the Chinese delegation. In the case of the ICCPR, the HKSAR delegation attends hearings under the leadership of the Chinese Permanent Representative and Ambassador to the UN. The UN Human Rights Council conducts a Universal Periodic Review (UPR) of human rights in all UN member states. The HKSAR submits its report as part of China's report for that review. In March, September and October 2013, HKSAR delegates attended hearings under the ICCPR, CRC and UPR mechanism respectively.

### **International Treaties and Agreements Applying to the HKSAR**

Under the Basic Law, multilateral treaties can apply to the HKSAR. There are approximately 251 such treaties. In certain areas, the HKSAR can conclude its own bilateral agreements and 220 such agreements have been concluded. Lists of these treaties and agreements and the English texts of the agreements are available on the internet, at [www.doj.gov.hk/eng/laws/treaties.html](http://www.doj.gov.hk/eng/laws/treaties.html).

### **Arbitration and Mediation**

A main policy objective of the government is to promote Hong Kong as a centre for international legal services and dispute resolution in the Asia Pacific region. The Department of Justice works closely with the Law Society of Hong Kong, the Hong Kong Bar Association and the arbitration and mediation-related bodies in Hong Kong to improve the provision of legal, arbitration and mediation services in Hong Kong, and to promote Hong Kong as a regional centre for legal services and dispute resolution.

HKSAR arbitral awards can be enforced in more than 140 jurisdictions that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The HKSAR has also entered into arrangements for reciprocal enforcement of arbitral awards with the Mainland and the Macao SAR.

In 2011, a new Arbitration Ordinance took effect reforming the arbitration law of Hong Kong on the basis of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law. In 2013, the ordinance was amended to include new provisions for reciprocal enforcement of arbitral awards between the HKSAR and the Macao SAR and for the judicial enforcement of relief granted by an emergency arbitrator before an arbitral tribunal is constituted, in line with the latest arbitration rules of many prominent arbitral institutions.

Three world-class arbitral institutions are established in Hong Kong. The Hong Kong International Arbitration Centre provides advisory and support services for dispute resolution in Hong Kong and the region. The International Court of Arbitration of the International Chamber of Commerce has a branch of its Secretariat in Hong Kong, and in September 2012 the China

International Economic and Trade Arbitration Commission established an office in Hong Kong, its first outside the Mainland.

The Mediation Ordinance came into operation on 1 January 2013 and provides a statutory framework for the conduct of mediation in Hong Kong and addresses areas of law such as confidentiality and admissibility of mediation communications in evidence.

The Hong Kong Mediation Accreditation Association Limited (HKMAAL), an industry-led company limited by guarantee with the Bar Association, the Law Society, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre as its founder members, commenced formal operation on 2 April 2013. The HKMAAL is the largest accreditation body for mediators in Hong Kong. It discharges both accreditation and disciplinary functions and regulates the standards for training and accreditation of mediators.

The Department of Justice takes a leading role in the promotion and development of mediation and aims to develop Hong Kong's legal services and to enhance Hong Kong's role as the Asia Pacific Region's dispute resolution hub. The work of the Secretary for Justice's Steering Committee on Mediation, established in 2012 to foster the growth of mediation in Hong Kong, includes monitoring the operation of the Mediation Ordinance. In July, a 'Mediate First' Pledge reception was organised to promote the use of mediation by companies, organisations and associations to resolve disputes before resorting to litigation.

### **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. He chairs the Law Reform Commission and 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. Pursuant to the Basic Law, the Department of Justice controls criminal prosecutions free from interference.

The Department of Justice 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, led 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. 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 a 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, constitutional (Basic Law and human rights) and electoral laws and Mainland 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 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, headed by the Chief Justice, is the highest appellate court in the HKSAR. There are three permanent judges and a panel of six non-permanent Hong Kong judges and 12 non-permanent judges from other common law jurisdictions. In hearing and determining appeals, the court consists of five judges, and the court may, as required, invite a non-permanent Hong Kong judge or a non-permanent judge from another common law jurisdiction 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 33 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 the Chief District Judge, one Principal Family Court Judge and 34 judges. There is no jury in any District Court proceedings. The Registrar and Deputy Registrars deal with interlocutory applications and taxation in civil matters. The District Court tries criminal cases except murder, manslaughter and rape. The maximum sentencing power is seven years' imprisonment. 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, equal opportunities 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 (excluding Deputy Magistrates and Deputy Special Magistrates) consists of nine Principal Magistrates (including two who are the Principals of the Labour Tribunal and the Small Claims Tribunal respectively), 51 Permanent Magistrates and nine Special Magistrates. 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 and the Employment Ordinance. 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.

## **The Legal Profession**

The legal profession in Hong Kong is divided into two branches: barristers and solicitors. Generally, solicitors have limited rights of audience whereas barristers have unlimited rights of audience in all courts and tribunals. Legislation was enacted in 2010 to allow eligible solicitors to apply for rights of audience before the High Court and the Court of Final Appeal.

Lawyers practising within one branch of the profession are not, at the same time, allowed to practise within the other. Hong Kong has 7,864 practising solicitors and 818 local law firms, plus 72 foreign law firms and 1,401 registered foreign lawyers. Around 375 solicitors are also notaries public. The Law Society is responsible for maintaining professional and ethical standards of solicitors, foreign lawyers and foreign law firms and for handling complaints against these legal professionals.

The barristers' professional body is the Bar Association. The professional conduct of Hong Kong's 1,238 barristers is regulated by the Bar Code.

## **Legal Aid**

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

### ***Legal Aid Department***

The Legal Aid Department provides legal aid services to any person, irrespective of his residence or nationality, who satisfies the means and merits tests. It has about 540 staff, including 74 lawyers.

### ***Legal Aid in Civil Cases***

Legal aid under the Ordinary Scheme is available for civil proceedings in the District Court, Court of First Instance, Court of Appeal, Court of Final Appeal, applications to the Mental Health Review Tribunal and death inquests if the interests of public justice so require. Major types of cases covered include family 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 a statutory allowance and certain deductible items) do not exceed \$269,620. For applicants aged 60 or above, the first \$269,620 will be disregarded when calculating the amount of disposable capital.

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 is an 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 chaired by the Registrar of the High Court and comprising a barrister and a solicitor.

### ***Supplementary Legal Aid Scheme***

This scheme provides legal assistance to applicants whose financial resources exceed the Ordinary Scheme's limit, with an upper financial eligibility limit of \$1,348,100. The scheme covers the following cases, where the claim is likely to exceed \$60,000 – personal injury claims; medical, dental or legal professional negligence claims, as well as professional negligence claims against certified public accountants (practising), registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorised land surveyors, registered landscape architects and estate agents; negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products; and monetary claims against the vendors in the sale of first-hand residential properties.

It also covers employees' compensation claims and representation for employees in appeals against awards made by the Labour Tribunal regardless of the amount in dispute.

The scheme is self-financing and funded by contributions from aided persons and a percentage payment deducted from damages or compensation recovered on their behalf.

### ***Legal Aid in Criminal Cases***

Legal aid is available for criminal 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. Applicants who pass the means test will be granted legal aid for trial provided the Director of Legal Aid is satisfied that it is in the interests of justice for legal aid to be granted. For appeals, it must be shown that there are valid grounds, except for appeals involving applicants charged with murder, treason or piracy with violence.

The Director of Legal Aid has discretion to grant legal aid in a criminal case even though the applicant's financial resources exceed the 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 passes the means test but is refused legal aid may apply to a judge for legal aid to be granted to him. Applicants charged with or convicted of murder, treason or piracy with violence may apply to a judge for legal aid not only for the trial or 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 chaired by the Registrar of the High Court and comprising a barrister and a solicitor.



This table sets out statistics for legal aid cases in 2013:

	Civil Cases		Criminal Cases
	Ordinary Scheme	Supplementary Scheme	
Number of applications	15,494	197	3,797
Number of certificates granted	7,239	147	2,785
Amount of expenditure incurred	\$458.5 million	\$5.1 million	\$109.7 million
Monies recovered	\$1,056.5 million	\$49.5 million	N/A

### **The Official Solicitor**

The Director of Legal Aid is also the Official Solicitor, appointed under the Official Solicitor Ordinance. 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. In 2013, the Official Solicitor took up 229 new cases.

### **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 62 reports covering subjects as diverse as commercial arbitration, description of flats on sale, guardianship and custody, hearsay, privacy, class actions and charities. The commission is currently considering a range of subjects, including sexual offences, archives law, access to information and third party funding for arbitration.

### **Director of Intellectual Property**

The office of the Director of Intellectual Property, established under the Director of Intellectual Property (Establishment) Ordinance, runs the Intellectual Property Department, which operates the Trade Marks, Patents, Designs and Copyright Licensing Bodies Registries. The department makes recommendations on policy and legislation related to intellectual property protection, provides civil intellectual property legal advice to the government, and promotes public awareness of and respect for intellectual property rights. It also facilitates and promotes the development of intellectual property trading in Hong Kong.

### **Equal Opportunities Commission**

The Equal Opportunities Commission (EOC) is an independent statutory body established to implement Hong Kong's anti-discrimination legislation. There are currently four anti-discrimination ordinances: the Sex Discrimination Ordinance, the Disability Discrimination

Ordinance, the Family Status Discrimination Ordinance and the Race Discrimination Ordinance. The EOC's functions include working towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race, and working towards the elimination of sexual harassment, and harassment and vilification on the grounds of disability and race.

In 2013, the EOC received 5,033 enquiries and 666 complaints relating to the four anti-discrimination ordinances. A total of 171 complaint cases were successfully conciliated.

### **The Privacy Commissioner for Personal Data**

The Privacy Commissioner for Personal Data (PCPD) is an independent statutory body established under the Personal Data (Privacy) Ordinance (PDPO) to monitor, supervise and promote compliance with the PDPO.

In 2013, the PCPD received 1,792 complaints and 24,161 enquiries, referred 20 cases to the Police for prosecution, received 28 matching procedure consent applications and conducted 194 compliance checks. It also inspected the MTR Corporation's closed-circuit television system used in train stations and compartments and published six investigation reports on significant complaint cases.

The PCPD organised 279 talks, seminars and workshops for the general public and various industry sectors to promote awareness and general understanding of personal data privacy. It also organised 95 professional workshops for data users, and conducted tailor-made seminars for the retail industry. On the international front, the PCPD collaborated with 18 privacy authorities to review the transparency of privacy policies of websites and smartphone applications worldwide.

The new provisions in the Personal Data (Privacy) (Amendment) Ordinance 2012 regulating the use of personal data in direct marketing and on provision of legal assistance came into force on 1 April 2013.

### **Websites**

Administration Wing, Chief Secretary for Administration's Office:

[www.admwing.gov.hk](http://www.admwing.gov.hk)

Bilingual Laws Information System: [www.legislation.gov.hk](http://www.legislation.gov.hk)

Constitutional and Mainland Affairs Bureau: [www.cmab.gov.hk](http://www.cmab.gov.hk)

Department of Justice: [www.doj.gov.hk](http://www.doj.gov.hk)

Home Affairs Bureau: [www.hab.gov.hk](http://www.hab.gov.hk)

Intellectual Property Department: [www.ipd.gov.hk](http://www.ipd.gov.hk)

Judiciary: [www.judiciary.gov.hk](http://www.judiciary.gov.hk)

Law Reform Commission: [www.hkreform.gov.hk](http://www.hkreform.gov.hk)

Legal Aid Department: [www.lad.gov.hk](http://www.lad.gov.hk)