

Chapter 2

The Legal System

‘Whether one is a long-term historical observer of Hong Kong or only of recent events here, there is one common feature: that Hong Kong has always faced challenges. In facing these challenges, Hong Kong has always regarded the existence of the rule of law to be crucial in providing the necessary stability amidst change. This is reflected in the Basic Law.’
– Chief Justice Mr Geoffrey Ma Tao-li at the Ceremonial Opening of the Court of Final Appeal Building on 25 September 2015

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 ordinances were adapted 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.

The judicial system was maintained except for those changes consequent upon the establishment of the Hong Kong Court of Final Appeal on 1 July 1997, which replaced the Judicial Committee of the Privy Council as the appellate court possessing the power of final

adjudication for Hong Kong. Pursuant to the Basic Law, judges from other common law jurisdictions have been invited to sit on the Court of Final Appeal since 1 July 1997.

Law in the HKSAR

The laws in force in the HKSAR are:

- the Basic Law;
- the national laws listed in Annex III to the Basic Law and as applied to the HKSAR by way of promulgation or legislation;
- 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
- 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. 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 duties 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), and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

Protection against discrimination is 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, while the Personal Data (Privacy) Ordinance, which is administered by the Privacy Commissioner for Personal Data, protects the privacy of individuals in relation to personal data.

United Nations Human Rights Treaties

Fifteen international human rights treaties are applicable to Hong Kong. Seven of these, namely, 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 (CAT), the Convention on the Rights of the Child, 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 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. In addition, the UN Human Rights Council conducts a Universal Periodic Review of the human rights situation in all UN member states. The HKSAR submits its report as part of China's report for that review. In November 2015, HKSAR delegates attended a hearing under the CAT.

International Treaties and Agreements Applying to the HKSAR

Under the Basic Law, multilateral treaties can apply to the HKSAR. There are 253 such treaties. In certain areas, the HKSAR can conclude its own bilateral agreements and 240 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.

Arbitration and Mediation

A main policy objective of the government is to promote Hong Kong as a centre for international legal and dispute resolution services in the Asia Pacific region. The Department of Justice works closely with the Law Society of Hong Kong, the Hong Kong Bar Association and other stakeholders in Hong Kong to improve the provision of legal, arbitration and mediation services locally, and to promote the territory as a regional centre for international legal and dispute resolution services. An Advisory Committee on Promotion of Arbitration, formed in December 2014, co-ordinates and advises on overall strategy.

HKSAR arbitral awards can be enforced in more than 150 states that are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The HKSAR has also entered into arrangements for reciprocal enforcement of arbitral awards with the Mainland and the Macao SAR. In October 2015, the first United Nations Commission on International Trade Law (UNCITRAL) Asia Pacific Judicial Conference (Judicial Roundtable and Judicial Summit), co-organised by the Department of Justice, the UNCITRAL and the Hong Kong International Arbitration Centre, was held in Hong Kong relating to, among other issues, international arbitration and the New York Convention.

In January 2015, the Permanent Court of Arbitration (PCA) signed a host country agreement with the Central People's Government and a related memorandum of administrative arrangements with the HKSAR Government to facilitate the conduct of PCA-administered arbitration in Hong Kong, including state-investor arbitration. The Department of Justice organised two seminars in March and November 2015 on PCA arbitration in Hong Kong, with speakers from the PCA, including its Secretary General at the November seminar.

In 2011, an Arbitration Ordinance took effect reforming Hong Kong's arbitration law on the basis of the latest version of the Model Law on International Commercial Arbitration adopted by

UNCITRAL. 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. In December 2015, the Department of Justice published a consultation paper, proposing to amend the ordinance so as to make it clear that disputes relating to intellectual property rights can be settled by arbitration and it would not be contrary to public policy to enforce an award solely because the award is in respect of a dispute or matter which relates to intellectual property rights.

Four world-class arbitral institutions are established in Hong Kong. The Hong Kong International Arbitration Centre provides comprehensive support services for dispute resolution in Hong Kong and the region. Hong Kong also hosts a branch of the Secretariat of the International Court of Arbitration of the International Chamber of Commerce; the first arbitration centre of the China International Economic and Trade Arbitration Commission outside the Mainland; and the first arbitration centre of the China Maritime Arbitration Commission outside the Mainland.

The Department of Justice takes a leading role in promoting and developing mediation. The Secretary for Justice's Steering Committee on Mediation monitors the implementation of the Mediation Ordinance and the operation of the Hong Kong Mediation Accreditation Association Limited, 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. It promotes the wider use of mediation among members of the public and in specific sectors, including small and medium enterprises, medical and health care, building management and property and intellectual property sectors. Initiatives undertaken in 2015 included a 'Mediate First' Pledge reception and seminar and a workshop focusing on evaluative mediation for resolving intellectual property disputes. In June, the steering committee launched a six-week public consultation on the enactment of apology legislation in Hong Kong, whose main objective was to encourage the making of timely apologies in order to facilitate amicable settlement of disputes by clarifying the legal consequences of making apologies. In December, the Department of Justice, together with the China Council for the Promotion of International Trade (CCPIT) and the Hong Kong Mediation Centre (HKMC), inaugurated a CCPIT-HKMC Joint Mediation Center that would be a platform for resolving cross-boundary commercial disputes.

The Mediation Ordinance, which took effect in 2013, provides a statutory framework for the conduct of mediation and addresses areas of law such as the confidentiality and admissibility of mediation communications in evidence without affecting the flexibility of the mediation process.

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 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, headed by the Law Officer (International Law), advises the government on issues relating to public international law. Its lawyers take part in the negotiation of agreements and arrangements with other jurisdictions. The division also handles requests for legal co-operation between the HKSAR and other jurisdictions.

The Law Draftsman heads the Law Drafting Division, which drafts, in Chinese and English, all legislation proposed by the government and provides professional support to policy bureaus throughout the legislative process. It also compiles the Laws of Hong Kong and maintains a legislation database which is available on the internet. The division is now developing a new legislation database with legal status.

The Solicitor General heads the Legal Policy Division, which includes the Law Reform Commission Secretariat. The division's policy responsibility covers certain matters affecting the administration of justice and those concerning the legal and arbitration professions. In addition, it provides legal policy input on a wide range of legislative proposals and administrative measures considered by the government, which also receives legal advice on issues touching on constitutional law from the Basic Law and human rights perspectives, as well as on electoral laws and Mainland law.

By virtue of the Basic Law, the department controls all criminal prosecutions, free from interference. 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 most 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 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 Chief Justice is the head of the Judiciary, assisted in its overall administration by the Judiciary Administrator.

The Court of Final Appeal, headed by the Chief Justice, is the HKSAR's highest appellate court. There are three permanent judges, four non-permanent Hong Kong judges and 10 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. In September 2015, the Court of Final Appeal moved to the Old Supreme Court Building at 8 Jackson Road, Central, from the Former French Mission Building at 1 Battery Path, Central, which had been its home since its establishment in 1997.

The High Court, comprising the Court of Appeal and the Court of First Instance, is headed by the Chief Judge of the High Court. There are 13 Justices of Appeal and 34 Judges of the Court of First Instance. The Registrar, Senior Deputy Registrars and Deputy Registrars 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, the Minor Employment Claims Adjudication Board and the Labour and Small Claims Tribunals.

A Competition Tribunal, which has primary jurisdiction to hear and adjudicate competition-related cases, was set up in December 2015. All Judges of the Court of First Instance are members of the Competition Tribunal, while the Registrar, Senior Deputy Registrars and Deputy Registrars of the High Court hold the corresponding positions in the tribunal.

The District Court is one level below the Court of First Instance. It comprises the Chief District Judge, one Principal Family Court Judge and 35 judges. The Registrar and Deputy Registrars deal mainly with interlocutory and taxation 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. There is no jury in any District Court proceedings.

The seven Magistrates' Courts process about 90 per cent of the criminal cases in the HKSAR annually. Led by the Chief Magistrate, the team (excluding Deputy Magistrates and Deputy Special Magistrates) consists of eight Principal Magistrates, 62 Permanent Magistrates and 11 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.

Statutory provisions empower them to impose sentences of up to three years' imprisonment and a \$5 million fine. 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, building management matters, rating and valuation appeals, applications for compulsory sale of land 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 inquiries 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. Solicitors' rights of audience are limited whereas barristers' are unlimited in all courts and tribunals where legal representation is allowed. Legislation that was enacted in 2010 allows eligible solicitors to apply for higher 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. As at 31 December 2015, Hong Kong has 8,647 practising solicitors and 854 local law firms, plus 77 foreign law firms and 1,299 registered foreign lawyers. Around 377 solicitors are also notaries public. The Law Society of Hong Kong maintains the professional and ethical standards of solicitors and foreign lawyers who are practising locally, and handles complaints against them.

The Hong Kong Bar Association is the professional body that regulates the professional conduct of Hong Kong's 1,331 barristers.

Legal Aid

Publicly funded legal aid services are provided through the Legal Aid Department and the Duty Lawyer Service. Legal aid ensures 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 services of a solicitor and, if necessary, of a barrister.

Legal Aid Department

The department provides legal aid services to any person, irrespective of residence or nationality, who satisfies both the means and merits tests. It has about 530 staff, including 76 lawyers.

Legal Aid in Civil Cases

The Ordinary Legal Aid Scheme run by the department is available for civil proceedings in the District Court, Court of First Instance, Court of Appeal and 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.

The means test requires applicants to show their financial resources (the aggregate of the person's annual disposable income and total disposable capital after deduction of a statutory allowance and certain deductible items) do not exceed \$290,380. For applicants aged 60 or above, the test disregards the first \$290,380 when calculating the amount of disposable capital.

The Director of Legal Aid may waive the statutory 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.

The merits test requires applicants to satisfy the director that there are reasonable grounds for bringing or defending the civil proceedings.

Aided persons may have to pay a contribution depending on their financial resources and are required to repay all the expenses incurred in the proceedings that are not recovered from the opposite party out of property recovered or preserved on their 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 also including a barrister and a solicitor.

Supplementary Legal Aid Scheme

This scheme helps people whose financial resources exceed the Ordinary Scheme's limit, allowing an eligibility limit of \$1,451,900. 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 practising certified public accountants, 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 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, being 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 under the Ordinary Legal Aid Scheme 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 appeals to the Court of Appeal and the Court of Final Appeal. Applicants who pass the means test will receive legal aid for trial provided the director is satisfied it is in the interests of justice to grant legal aid. For appeals, it must be shown that there are reasonable grounds, except for appeals involving applicants charged with murder, treason or piracy with violence.

The director has the discretion to grant legal aid in a criminal case where the applicant's financial resources exceed the eligibility limit, if the director is satisfied it is desirable in the interests of justice to do so, subject to the 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. 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 the Review Committee.

This table sets out statistics for legal aid cases in 2015:

	Civil Cases		Criminal Cases
	Ordinary Scheme	Supplementary Scheme	Ordinary Scheme
Number of applications	14,954	211	3,630
Number of certificates granted	6,889	169	2,521
Amount of expenditure incurred	\$454.4 million	\$3.7 million	\$123.8 million
Monies recovered	\$1,242.2 million	\$81.0 million	N/A

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 as committee of the estate of mentally incapacitated persons. In 2015, the Official Solicitor took up 273 new cases.

The Law Reform Commission

The 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 64 reports covering subjects as diverse as commercial arbitration, description of flats on sale, guardianship and custody, hearsay, privacy, class actions and charities. Subjects now under the commission's consideration include sexual offences, archives law, access to information, third-party funding for arbitration and periodical payments for future pecuniary loss in personal injury cases.

Director of Intellectual Property

The office of the Director of Intellectual Property, established under the Director of Intellectual Property (Establishment) Ordinance (Cap 412), runs the Intellectual Property Department, which operates the trade marks, patents, designs and copyright licensing bodies registries. With regard to intellectual property, the department makes recommendations on policy and legislation, provides civil legal advice to the government, and promotes public awareness of and respect for intellectual property rights. It also facilitates and promotes Hong Kong's development into a premier intellectual property trading hub in the region.

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 2015, the EOC received 3,402 enquiries and 509 complaints relating to the four anti-discrimination ordinances. A total of 112 complaint cases were successfully conciliated.

Office of the Privacy Commissioner for Personal Data

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

In 2015, the PCPD received 1,971 complaints, 18,456 enquiries and 44 matching procedure consent applications; conducted 279 compliance checks and 76 self-initiated investigations; and published two investigation reports and two guidance notes.

The PCPD organised 276 talks, seminars and workshops for the public and various industries to promote awareness and understanding of personal data privacy, including 77 professional workshops for data users and 13 seminars and activities for mobile applications developers. The

PCPD also organised and hosted the International Conference on Big Data from a Privacy Perspective and the 43rd Asia Pacific Privacy Authorities Forum on 10 and 11–12 June 2015 respectively.

Websites

Administration Wing, Chief Secretary for Administration's Office:

www.admwing.gov.hk

Bilingual Laws Information System: www.legislation.gov.hk

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

Department of Justice: www.doj.gov.hk

Equal Opportunities Commission: www.eoc.org.hk

Home Affairs Bureau: www.hab.gov.hk

Intellectual Property Department: www.ipd.gov.hk

Judiciary: www.judiciary.gov.hk

Law Reform Commission: www.hkreform.gov.hk

Legal Aid Department: www.lad.gov.hk

Privacy Commissioner for Personal Data: www.pcpd.org.hk