

Chapter 2

The Legal System

'The right to liberty and security of person are firmly guaranteed under the Basic Law and the Bill of Rights. Except properly permitted under our laws, neither unauthorised criminal investigation nor unlawful arrest within the jurisdiction by anyone or any authority shall be tolerated.'

– Secretary for Justice, Mr Rimsky Yuen, SC, at the ceremonial opening of the Legal Year 2016 on 11 January 2016

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

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 Constitution of the PRC.

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 and freedoms guaranteed to the people of Hong Kong.

Continuation of Legal System

The Basic Law guarantees the continuance of the common law 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 or are amended by the HKSAR's legislature. 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 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 contravened 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. A new electronic legislation database with legal status is under preparation after the Legislation Publication Ordinance was enacted.

Legal Protection for Rights of the Individual

Chapter III of the Basic Law prescribes the fundamental rights and duties of Hong Kong residents. Among others, 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 for in the Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance and 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, ICESCR, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, and United Nations (UN) Convention on the Rights

of Persons with Disabilities require states parties to submit periodic reports and other requested information to UN treaty monitoring bodies. With the exception of the ICCPR, which does not apply to the Mainland of China, the HKSAR submits these reports as part of corresponding reports submitted by China and HKSAR teams attending hearings of the relevant treaty bodies as part of the Chinese delegation. The HKSAR delegation attends ICCPR 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.

International Treaties and Agreements Applying to 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 244 such agreements have been concluded. Lists of these treaties and agreements and the English texts of the agreements are available at www.doj.gov.hk/eng/laws/treaties.html.

Arbitration and Mediation

The government has a steadfast policy to promote Hong Kong as a leading centre for international legal and dispute resolution services in the Asia Pacific region. The Department of Justice works closely with the legal and dispute resolution communities 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 coordinates 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 also has arrangements for reciprocal enforcement of arbitral awards with the Mainland and the Macao SAR.

The Arbitration Ordinance, which took effect in 2011, reformed Hong Kong's arbitration law based on the latest version of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL). The ordinance was amended in 2013 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 December 2016, the department introduced a bill into the Legislative Council to amend the ordinance again 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. In the same month, another amendment bill was published in the Gazette. The bill seeks to clarify that third-party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and to provide for related measures and safeguards. The bill is based on the recommendations made in the Report on Third Party Funding for Arbitration published by the Law Reform Commission of Hong Kong in October 2016 and the views of the Steering Committee on Mediation chaired by the Secretary for Justice.

Apart from the home-grown Hong Kong International Arbitration Centre, Hong Kong also hosts the operations of three other world-class arbitral institutions, namely the Secretariat of the International Court of Arbitration of the International Chamber of Commerce, China International Economic and Trade Arbitration Commission, and China Maritime Arbitration Commission.

The department takes a leading role in promoting and developing mediation. The steering committee monitors the implementation of the Mediation Ordinance, which took effect in 2013. The Mediation Ordinance 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 steering committee also monitors the operation of the Hong Kong Mediation Accreditation Association Limited, an industry-led company limited by guarantee with the Bar Association, Law Society, Hong Kong International Arbitration Centre and Hong Kong Mediation Centre as its founder members. In addition, the steering committee 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, intellectual property and education, ethnic minorities and new immigrants.

To take forward its recommendation to enact apology legislation, in 2016 the steering committee launched and concluded a second public consultation and published its final report and recommendations. The main objective of the legislative proposal is to encourage the making of timely apologies in order to facilitate amicable settlement of disputes by stating the legal consequences of making apologies. Based on the final recommendations of the steering committee, the department is preparing for the enactment of the apology legislation in the 2016-17 legislative year.

In 2016, the department also hosted the Mediation Week, which consisted of six seminars, a mediation carnival and a mediation conference with eminent international and local mediators as speakers.

Secretary for Justice

The Secretary for Justice heads the Department of Justice, and is the HKSAR Government's legal adviser and a member of the Executive Council. He chairs the Law Reform Commission and is Deputy Chairman of the Fight Crime Committee as well as 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 division also promotes wider use of mediation to resolve disputes.

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 in areas such as air services, avoidance of double taxation, international trade and investment promotion and protection. The division also handles requests for legal cooperation 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. They also 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. 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, three 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. The Court of Final Appeal moved to the Old Supreme Court Building at 8 Jackson Road, Central, in 2015 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 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, District Court and 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, Minor Employment Claims Adjudication Board and Labour and Small Claims Tribunals.

A Competition Tribunal, set up in 2015, has primary jurisdiction to hear and adjudicate competition related cases. All Judges of the Court of First Instance are members of the 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. There is no jury. 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.

The Family Court, comprising nine courts, is part of the District Court. It hears applications pertaining to divorce, separation and related family and matrimonial matters such as applications concerning children and financial relief. Notwithstanding the District Court's general civil jurisdiction, there is no limit on the amount claimed in the Family Court. It also deals with applications under domestic violence legislation and the Inheritance (Provision for Family and Dependents) Ordinance. Most hearings are conducted in private, save for defended divorces and enforcement actions.

The seven Magistrates' Courts process about 90 per cent of criminal cases annually. Led by the Chief Magistrate, the team, excluding Deputy Magistrates and Deputy Special Magistrates,

comprises eight Principal Magistrates, 55 Permanent Magistrates and 11 Special Magistrates. Magistrates exercise criminal jurisdiction over a wide range of offences. Their sentencing power is generally limited to two years' imprisonment and a \$100,000 fine, though statutory provisions empower them to impose 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 age 16. Special Magistrates handle departmental summonses for 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.

There are five specialised tribunals. The Lands Tribunal is led by a President who is a High Court Judge and comprises presiding officers who are District Judges and members who may be experienced professional surveyors. The 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 employment contracts 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 into the causes and circumstances of a death.

According to the Basic Law and Official Languages Ordinance, the courts can use both official languages in any proceedings.

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, Hong Kong has 9,076 practising solicitors, 870 local law firms, 81 foreign law firms and 1,358 registered foreign lawyers. About 384 solicitors are also notaries public. The Law Society of Hong Kong maintains the professional and ethical standards of solicitors and foreign lawyers 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 1,386 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 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.

The Legal Aid Department provides legal aid services to any person, irrespective of residence or nationality, who satisfies both the means and merits tests. It has about 540 staff, including 77 lawyers.

Legal Aid in Civil Cases

The department runs an Ordinary Legal Aid Scheme 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 sum of the person's annual disposable income and total disposable capital after deducting 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 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 Court of Final Appeal. Applicants who pass the means test 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 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 at higher rates calculated according to the applicant's financial resources.

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.

Legal aid cases in 2016

	Civil Cases		Criminal Cases
	Ordinary Scheme	Supplementary Scheme	Ordinary Scheme
Number of applications	14,733	225	3,567
Number of certificates granted	6,878	164	2,641
Amount of expenditure incurred	\$546.2 million	\$6.6 million	\$130.2 million
Monies recovered	\$1,314 million	\$81.1 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 2016, the Official Solicitor took up 258 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 65 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, causing or allowing the death of a child 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 as a premier intellectual property trading hub in the region.

Equal Opportunities Commission

The Equal Opportunities Commission (EOC) is an independent statutory body that implements anti-discrimination legislation. There are four anti-discrimination ordinances: the Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance and 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 towards the elimination of sexual harassment, and harassment and vilification on the grounds of disability and race.

In 2016, the EOC received 3,900 enquiries and 601 complaints relating to the four ordinances. A total of 148 complaint cases were successfully conciliated.

Office of the Privacy Commissioner for Personal Data

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

In 2016, the office received 1,838 complaints, 16,180 enquiries and 26 matching procedure consent applications; conducted 259 compliance checks and four self-initiated investigations; and published one guidance note.

The office organised 255 talks, seminars and workshops for the public and various industries to promote awareness and understanding of personal data privacy, including 46 professional workshops for data users. It also jointly organised a Symposium on Data Protection Law

Development in the Information Age with the City University of Hong Kong's School of Law on 9 September.

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