

## Chapter 3

# Legal System

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'If one has to ask what the most unique strength of Hong Kong's common law system is, I would say it is its resilience. It has a long tradition of over a century, and has stood the test of time. We have the exceptional ability to prove sceptics and pessimists wrong.' – Secretary for Justice, Mr Paul Lam, SC, at the ceremonial opening of the legal year 2023.

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

### **Basic Law**

The HKSAR's constitutional framework is provided by the Basic Law, enacted by the National People's Congress (NPC) under Article 31 of the Constitution of the PRC.

Since the establishment of the HKSAR on 1 July 1997, the gradual development of a body of jurisprudence on the Basic Law has reinforced its effectiveness in determining the rights and freedoms guaranteed to the people of Hong Kong.

### **Law in HKSAR**

As provided in Article 18 of the Basic Law, the laws in force in the HKSAR are:

- the Basic Law;
- the laws previously in force in Hong Kong before 1 July 1997 (including the common law, rules of equity and customary law as well as statutory law as referred to in Article 8 of the Basic Law), other than those not adopted as laws of the HKSAR in accordance with the Decision by the NPC's Standing Committee (NPCSC) made under Article 160 of the Basic Law because they contravened the Basic Law;
- laws enacted by the HKSAR's legislature which, according to Article 11(2) of the Basic Law, shall not contravene the Basic Law; and
- the national laws listed in Annex III to the Basic Law and as applied to the HKSAR by way of promulgation or legislation.

Under Article 158 of the Basic Law, the power of interpretation of the Basic Law is vested in the NPCSC. Hong Kong courts are authorised to interpret the Basic Law in adjudicating cases.

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

The Chinese and English texts of the HKSAR's legislation are equally authentic. The Hong Kong e-Legislation website provides current and past versions of consolidated legislation dating back to 30 June 1997 and copies of legislation marked 'verified copy' have legal status. The hard-copy loose-leaf edition of legislation is being phased out.

### **Continuation of Common Law System and Judicial System**

The common law system has been maintained by the Basic Law since the PRC's resumption of the exercise of sovereignty over Hong Kong on 1 July 1997 through the continuation of the application of the laws previously in force in Hong Kong.

The judicial system previously practised in Hong Kong has been 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 exercising 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.

Judges, magistrates and other judicial officers are appointed by the Chief Executive on the recommendation of the independent Judicial Officers Recommendation Commission, which is chaired by the Chief Justice of the Court of Final Appeal, with the Secretary for Justice, two other judges, two persons from the legal profession and three lay persons as members. Under the Basic Law, judges shall be chosen on the basis of their judicial and professional qualities and may be appointed from other common law jurisdictions. The Basic Law also provides that judges may be removed from office only for inability to discharge their duties or for misbehaviour, on the recommendation of a tribunal appointed by the Chief Justice and consisting of at least three local judges. Articles 2 and 19 of the Basic Law provide that the HKSAR enjoys independent judicial power, including that of final adjudication, which is vested in the Court of Final Appeal under Article 82. Pursuant to Article 85 of the Basic Law, the HKSAR courts shall exercise judicial power independently, free from any interference.

### **Department of Justice**

The Department of Justice, headed by the Secretary for Justice, plays a significant role in the legal system and in upholding the rule of law in Hong Kong. The Secretary for Justice is the government's chief legal adviser and represents the government in all actions brought by, or against, it. The Secretary for Justice also has a constitutional duty to make prosecutorial decisions independently, free from any interference.

The Deputy Secretary for Justice assists the Secretary for Justice in discharging his duties, including the promotion of the rule of law, judicial independence and the legal system, as well as enhancing the legal exchanges and liaison with the Mainland and overseas.

The Department of Justice provides legal advice on civil matters to the government and represents the government in claims and disputes, as well as implements initiatives to promote alternative dispute resolution services in Hong Kong. It advises government departments and bureaux on whether proposed legislation, or a particular policy, is consistent with the Basic Law, international human rights standards as applied in Hong Kong, and established principles underlying the legal system.

The department is responsible for new legislation promoted by the Secretary for Justice. It also has a specialist unit which addresses the need for advice on Mainland law and promotes understanding and cooperation between the two places in relation to legal and dispute resolution matters.

The department drafts all legislation proposed by the government, vets the form of draft legislation proposed by non-governmental bodies, and updates the consolidated legislation on the Hong Kong e-Legislation website.

It prosecutes trials and appeals on behalf of the HKSAR, including those of offences endangering national security, and provides legal advice to law enforcement agencies upon request. It controls criminal prosecutions free from interference by virtue of Article 63 of the Basic Law and acts in accordance with the Prosecution Code.

The department also advises the government on international law issues, participates in treaty negotiations and international conferences, and handles requests for international legal cooperation.

The Legal Enhancement and Development Office acts as the central policy unit of the department, assisting in formulating and taking forward policy initiatives, including the promotion of rule of law education and Hong Kong's strengths in legal and dispute resolution services, and strengthening legal cooperation with the Mainland and the interface of legal practices between Hong Kong and the Guangdong-Hong Kong-Macao Greater Bay Area (GBA).

In 2023, the department saw some developments and achievements under the following policy objectives.

### ***Legal and Dispute Resolution Services***

The Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong was extended for two years from 1 March and expanded to cover all visitors to Hong Kong. Under the scheme, eligible people can participate in arbitral proceedings in Hong Kong without obtaining an employment visa.

### ***Outcome Related Fee Structures for Arbitration***

The Outcome Related Fee Structures for Arbitration regime provides arbitration users with additional flexible fee arrangements. In 2023, the department promoted the regime and published guides and tools to enhance users' understanding of the regime and to facilitate its wider use.

### ***Guangdong-Hong Kong-Macao Greater Bay Area Development***

The GBA Task Force, chaired by the Deputy Secretary for Justice, was set up in January and held two meetings in 2023. The department is taking forward the task force's recommendations on facilitating the interface of the legal systems and legal practice, as well as the connection of legal talents in the GBA.

The Gateway to the Opportunities in the GBA conference was held in November during Hong Kong Legal Week, in which issues such as legal cooperation, the interface of legal systems and enhancing participation by Hong Kong and Macao legal sectors in Mainland legal proceedings were discussed by practitioners and experts from the GBA. A mock court session illustrated the similarities and differences in substantive laws and procedures for cross-boundary commercial disputes among the three jurisdictions.

At the fifth Joint Conference of Legal Departments in GBA held in December, Guangdong, Macao and Hong Kong jointly agreed to establish a collaborative online dispute resolution platform to integrate information and resources in relation to mediation and arbitration,

establish panels of GBA mediators and arbitrators, and set up a working group to enhance measures in nurturing foreign-related legal talent.

### *Hong Kong Legal Services Forum*

The sixth Hong Kong Legal Services Forum was held in Chengdu in August, attracting more than 1,200 legal practitioners and trade representatives from the Chengdu-Chongqing region. It showcased Hong Kong as an international legal and dispute resolution services centre, with speakers discussing cross-border topical issues of interest to the Mainland audience.

In August, the department, the State-owned Assets Supervision and Administration Commission of the State Council, and the Department of Treaty and Law of the Ministry of Commerce, organised a seminar in Beijing, to illustrate the strengths of the legal sector in assisting Mainland enterprises to go global.

### *International Cooperation and Promotion*

Hong Kong is authorised under the Basic Law to conduct relevant external affairs and use the name 'Hong Kong, China' to conclude and implement agreements with foreign states and regions and international organisations in appropriate fields, including economic, trade, financial and monetary, shipping, communication, tourism, cultural and sports.

As members of the Chinese delegation, the department's counsel participated in meetings and working groups of the United Nations Commission on International Trade Law (UNCITRAL), the Hague Conference on Private International Law (HCCH) and the Asian-African Legal Consultative Organisation (AALCO).

During Hong Kong Legal Week, the department co-organised with UNCITRAL the fifth UNCITRAL Asia-Pacific Judicial Summit, and with the Office of the Commissioner of the Ministry of Foreign Affairs in the HKSAR the Legal Forum on Interconnectivity and Development. The department supported the HCCH in hosting the HCCH Asia Pacific Week in Hong Kong in September in celebration of the 130th anniversary of the HCCH, and the AALCO Hong Kong Regional Arbitration Centre to organise the AALCO Annual Arbitration Forum in December.

The department's counsel chaired the Economic Committee under the Asia-Pacific Economic Cooperation (APEC) and participated in the work under the APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes that Hong Kong opted into.

The International Organisation for Mediation Preparatory Office was established in February, a significant initiative to promote mediation to resolve international conflicts. The office organised international negotiations on the Convention on the Establishment of the International Organisation for Mediation and promoted the application of international mediation. The department's counsel provided support to the office and participated in the international negotiations as part of the Chinese delegation.

### *LawTech Development*

The Hong Kong Legal Cloud was launched in 2022, providing safe, secure and affordable data storage services for local legal and dispute resolution industries. The department provides subsidies for use of legal cloud services to solicitors, barristers, arbitrators, mediators, trainee solicitors, trainee barristers and Post-graduate Certificate in Laws students.

In November, a hybrid meeting of members of the Inclusive Global Legal Innovation Platform on Online Dispute Resolution explored the latest developments and potential issues in online dispute resolution.

### *Strengthening Rule of Law Education*

In February, the department established the Steering Committee on Rule of Law Education, chaired by the Secretary for Justice, to advise on the strategy for promoting rule of law education in Hong Kong.

With the committee's assistance, the department launched the first phase of the Rule of Law Education Train-the-Leaders Programme in November to enhance rule of law education in the community.

The Rule of Law for the Future conference, a highlight event of Hong Kong Legal Week, showcased the strengths of Hong Kong's international legal and dispute resolution services in supporting the development of the city's eight centres under the National 14th Five-Year Plan. It focused on Hong Kong's restoration of prosperity and stability through the enactment of the national security law, as well as the importance of developing and promoting rule of law education.

### *Training, Attracting and Retaining Legal Talent*

The department supports the development of local legal talent by offering internships and placements, and by engaging less experienced lawyers to undertake court work.

The department supported the Asian Academy of International Law to organise the Hong Kong training session of the China-AALCO Exchange and Research Programme on International Law, and was also a co-organiser of the first edition of the Hague Academy of International Law's Advanced Course in Hong Kong.

Secondment arrangements with international organisations, such as the Asian Infrastructure Investment Bank, HCCH, UNCITRAL and the International Institute for the Unification of Private Law, provide training and working opportunities for Hong Kong legal professionals from the private and public sectors.

## **The Judiciary**

As prescribed in the Basic Law, the HKSAR has been authorised by the NPC to exercise independent judicial power, including the power of final adjudication. It has also been stated in express terms that the HKSAR's courts shall exercise judicial power independently, free from any interference. Judges are appointed by the Chief Executive on the recommendation of an

independent commission composed of local judges, members of the legal profession and eminent persons from other sectors. Judges are chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. Members of the Judiciary shall be immune from legal action in the performance of their judicial functions. As reflected in their judicial oath, in exercising their judicial power, judges are constitutionally required to determine and handle cases strictly in accordance with the applicable law and legal principles.

In line with the principle of judicial independence, the pay and conditions of service of judges and judicial officers are determined by the Chief Executive-in-Council on the advice of the 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. The court, when sitting, will comprise five judges – usually the Chief Justice, three permanent judges and one non-permanent judge from another common law jurisdiction. If the Chief Justice is not available to sit, one of the three permanent judges will preside and an additional Hong Kong non-permanent judge will sit. If a permanent judge is not available to sit, again a Hong Kong non-permanent judge will sit in his place. The Registrar deals mainly with interlocutory matters and taxation of costs.

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 14 Justices of Appeal and 34 Judges of the Court of First Instance on the establishment. The Registrar, Senior Deputy Registrars and Deputy Registrars deal mainly with interlocutory matters and taxation of costs.

The Court of Appeal hears civil and criminal appeals from the Court of First Instance, Competition Tribunal, 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. Unless the law stipulates otherwise, criminal cases in the Court of First Instance, which all involve serious criminal offences, are tried by a judge sitting 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, Labour Tribunal, Small Claims Tribunal and Obscene Articles Tribunal as well as appeals from the Minor Employment Claims Adjudication Board.

The Competition Tribunal 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, which also includes the Family Court, is led by the Chief District Judge, who is assisted by the Principal Family Court Judge. There are 42 District Judges on the

establishment. The Registrar and Deputy Registrars deal mainly with civil interlocutory matters and taxation of costs. The District Court has civil and criminal jurisdiction and powers as are conferred upon it by law. Its general civil jurisdiction is limited to claims up to \$3 million, or the recovery of land where the annual rent, rateable value or annual value of the land does not exceed \$320,000. The maximum sentencing power in criminal cases is seven years' imprisonment. There is no jury trial in the District Court.

The Family Court has 14 courts, eight of which are manned by Family Judges and the rest by Family Masters. The Family Court 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 limited general civil jurisdiction, there is no monetary limit in the Family Court. It also deals with applications under domestic violence legislation and the Inheritance (Provision for Family and Dependants) 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. Led by the Chief Magistrate, the team comprises four Principal Magistrates and 69 Permanent 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, but they are empowered to impose up to three years' imprisonment and a \$5 million fine where a statutory provision specifies. They also handle cases in the Juvenile Courts, which deal with offences, except homicide, committed by children and young persons below the age of 16.

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 the 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 exercises exclusive jurisdiction in handling claims arising from labour disputes and matters under the Employment Ordinance. The Small Claims Tribunal handles civil claims not exceeding \$75,000. 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 deaths.

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

## 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.



## **Legal Aid in Civil Cases**

### **Ordinary Legal Aid Scheme**

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 department provides legal aid services to eligible applicants who pass both a means test and merits test regardless of their place of residence or nationality. 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 \$440,800. For applicants aged 60 or above, the test disregards the first \$440,800 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.

The department will arrange a solicitor and/or a barrister to act for the eligible applicant after legal aid is granted. 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 the 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, for Court of Final Appeal cases, to a Review Committee chaired by the Registrar of the High Court and with a barrister and a solicitor as members.

### **Supplementary Legal Aid Scheme**

This self-financing scheme helps people whose financial resources exceed the Ordinary Scheme's limit, allowing an eligibility limit of \$2,204,030. The scheme covers the following types of cases where the claim is likely to exceed \$75,000: personal injury or death claims; medical, dental or professional negligence claims against nine professions; negligence claims against insurers or their intermediaries; monetary claims in first-hand property sales; and negligence and monetary claims against certain financial intermediaries. 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.

## **Legal Aid in Criminal Cases**

Legal aid is available under the Ordinary Legal Aid Scheme for committal proceedings in the Magistrates' Courts, criminal trials in the District Court and the Court of First Instance, appeals

from the Magistrates' Courts and appeals to the Court of Appeal and the Court of Final Appeal. Applicants who pass the means test receive legal aid for trial, provided the Director of Legal Aid is satisfied it is desirable in the interests of justice to grant legal aid.

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. The Review Committee hears appeals against the refusal of legal aid for appeals to the Court of Final Appeal.

### **Legal Aid Cases in 2023**

	Civil Cases		Criminal Cases
	Ordinary Scheme	Supplementary Scheme	Ordinary Scheme
Number of applications	9,417	141	3,105
Number of certificates granted	3,937	87	2,459
Amount of legal expenditure incurred	\$707.8 million	\$8.4 million*	\$423.6 million
Monies recovered	\$961.8 million	\$38.8 million*	N/A

\* The figures are unaudited.

### **Duty Lawyer Scheme**

The Duty Lawyer Scheme provides legal representation to eligible defendants appearing in all Magistrates' Courts and Juvenile Courts, and to any person who is at risk of criminal prosecution as a result of giving incriminating evidence in a Coroner's inquest. It also covers contempt proceedings in the Labour Tribunal, Small Claims Tribunal and Competition Tribunal. Defendants are provided with legal representation on the first day of court appearance without any means testing. If defendants wish to have legal representation for subsequent appearances, a means test is required. The financial eligibility limit is a gross annual income of \$223,000. After passing the means test, defendants are required to pay a one-off fixed handling charge of \$620. In 2023, 20,961 defendants were assisted.

### **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 2023, the Official Solicitor took up 304 new cases.

### ***Legal Advice Scheme for Unrepresented Litigants on Civil Procedures***

The Legal Advice Scheme for Unrepresented Litigants on Civil Procedures under the Administration Wing, Chief Secretary for Administration's Office, provides free legal advice on civil procedural matters for unrepresented litigants who have not engaged lawyers nor been granted legal aid. The scheme covers litigants who commence or are parties to civil legal proceedings in the Lands Tribunal, Family Court, District Court or courts at levels above. In 2023, a total of 2,450 advice sessions were given to eligible applicants.

### **Websites**

Administration Wing, Chief Secretary for Administration's Office: [www.admwing.gov.hk](http://www.admwing.gov.hk)

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

Hong Kong e-Legislation: [www.elegislation.gov.hk](http://www.elegislation.gov.hk)

Hong Kong's legal services: [www.legalhub.gov.hk](http://www.legalhub.gov.hk)

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

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

Treaties and international agreements: [www.doj.gov.hk/eng/laws/treaties.html](http://www.doj.gov.hk/eng/laws/treaties.html)