



THE HONG KONG  
LEGAL SYSTEM

*Second Edition*

Stefan H C Lo  
Kevin Kwok-yin Cheng  
Wing Hong Chui

**CAMBRIDGE**  
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,  
New Delhi - 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781108721820](http://www.cambridge.org/9781108721820)

DOI: 10.1017/9781108634687

First edition © McGraw-Hill, Education 2012

Second edition © Cambridge University Press 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2012

Second edition 2020

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Lo, Stefan H. C., author. | Cheng, Kevin Kwok-yin, 1985- author. | Chui, Wing Hong, author.

Title: The Hong Kong legal system / Stefan H C Lo, Kevin Kwok-yin Cheng, Wing Hong Chui.

Description: Second edition. | New York : Cambridge University Press, 2020. |

Includes bibliographical references and index.

Identifiers: LCCN 2019038146 (print) | LCCN 2019038147 (ebook) |

ISBN 9781108721820 (paperback) | ISBN 9781108634687 (epub)

Subjects: LCSH: Law-China-Hong Kong.

Classification: LCC KNQ9308 .L627 2020 (print) | LCC KNQ9308 (ebook) | DDC 349.5125-dc23

LC record available at <https://lcn.loc.gov/2019038146>

LC ebook record available at <https://lcn.loc.gov/2019038147>

ISBN 978-1-108-72182-0 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

## Contents

<i>List of Figures</i>	page vi
<i>List of Tables</i>	vii
<i>Preface to the Second Edition</i>	ix
<i>Acknowledgements</i>	xi
<i>Table of Cases</i>	xii
<i>Table of Legislation</i>	xxv
<b>1</b> Introduction and Overview	1
<b>2</b> Functions and Concepts of Law	34
<b>3</b> Governance in Hong Kong	62
<b>4</b> Sources of Law	90
<b>5</b> The Court System and the Doctrine of Precedent	137
<b>6</b> The Process of Legislation	183
<b>7</b> Statutory Interpretation	200
<b>8</b> Criminal Justice System	234
<b>9</b> Civil Justice System	264
<b>10</b> Alternative Methods of Resolving Disputes	287
<b>11</b> Access to Justice	305
<b>12</b> Finding and Citing Legal Materials	329
<b>13</b> Interface between Hong Kong and International and Chinese Law	366
<i>Glossary</i>	392
<i>Index</i>	400

## Figures

4.1	Different parts of a statute, as shown on the first page of the Pharmacy and Poisons Ordinance (Cap. 138)	page 105
4.2	Different levels of a section, as shown in s. 247 of the Securities and Futures Ordinance (Cap. 571)	106
4.3	Section 293 of the Securities and Futures Ordinance (Cap. 571)	107
4.4	Different meanings of the term 'common law'	108
4.5	Headnote from <i>Loyal Luck Trading Ltd v. Tam Chun Wah</i> showing the different parts of a reported case	115
5.1	Court system pre-1 July 1997	142
5.2	Court system post-1 July 1997	146
8.1	Criminal procedure in Hong Kong	240
9.1	Civil litigation in Hong Kong	267

## Tables

6.1	Number of member's bills passed	page 194
8.1	Conviction and guilty plea rates, 2014-2017	254

Professional Bookshop  
www.pbookshop.com

significance in the wake of competition from other major metropolises both in Mainland China and elsewhere in Asia.

The transfer of sovereignty over Hong Kong in 1997 has sought to largely preserve the existing laws and legal system of Hong Kong, but the legal constitutional framework and the social and political landscape within which the legal system exists have been vastly altered after 1997. Hong Kong is unique in that under the concept of 'one country, two systems', the territory is able to maintain a common law legal system underpinned by liberal ideology, within a country that operates under a socialist and civil law tradition. The period leading to the handover was beset with disputes and debate over the design of the new system, with concerns as to the extent to which the existing legal system in Hong Kong could survive the handover and remain independent from the Mainland. There have been various controversies since the handover concerning the operation of the concept of 'one country, two systems', including controversies within or affecting the legal sphere. While the worst fears have not to date been realised, continuing controversies highlight the tensions in the system.

This book aims to provide an introduction to the Hong Kong legal system for first-year students who are coming into contact with studying law as well as students of other disciplines, and practitioners and scholars from other jurisdictions who are looking for a comprehensive and user-friendly overview of Hong Kong's legal system. More specifically, it highlights major issues and tensions across different aspects of the legal system under the new constitutional framework, especially after the return of sovereignty of Hong Kong to the People's Republic of China (PRC).

The book also seeks to provide students with a basic understanding of the main institutions in the Hong Kong legal system and with basic skills in finding, understanding and interpreting the law. As an introductory text for students studying the law in Hong Kong for the first time, the book does not aim to be comprehensive or to provide a detailed or advanced understanding of all aspects of Hong Kong's legal system. It is intended to equip first-year law students with the basic knowledge and skills which are needed for their further learning of the law. The book is also intended to provide an introduction to the Hong Kong legal system for non-law students. The law reaches into all facets of society and thus some understanding of the legal system may also be important for students whose core discipline is in another area. This book therefore provides an

introduction to the legal system in Hong Kong for both first-year law students, students of other disciplines and those from other jurisdictions interested in learning more about Hong Kong's legal system.

## Elements of the Legal System

Before discussing the historical development of the legal system of Hong Kong, this section introduces what a study of a legal system involves. The Hong Kong legal system is an amalgamation of principles, institutions, personnel and processes.<sup>1</sup> The system is the aggregate of the complex web of functions performed by these different elements. These different areas are not bound together by a central entity or department, and how they work together can be difficult to ascertain. Some aspects of these elements will be discussed further in subsequent chapters in order to articulate the workings of the contemporary legal system in Hong Kong.

When one thinks about what a legal system is, many things may come to mind, including the ideologies (such as the rule of law and human rights), the procedures (such as the law-making and trial processes) and the actors (such as lawmakers, judges, police and lawyers). It can be said with certainty that Hong Kong possesses a legal system, and other jurisdictions do as well. They may be similar, like Hong Kong with other common law jurisdictions, or connected but different, like the relationship of 'one country, two systems' that Hong Kong shares with Mainland China. What is difficult is to provide an overarching and convenient definition of what a legal system is. Rather, several building blocks are needed to provide a framework for the understanding of the term 'legal system'.<sup>2</sup>

First and foremost, a legal system embodies the institutions that create, operate and carry out the laws of the jurisdiction. In Hong Kong, the Legislative Council is responsible for enacting its laws.<sup>3</sup> Law enforcement agencies, most notably the Hong Kong Police Force, ensure that the public complies with the law. The courts also play an important role in operating and upholding the legal system. There are less known and less visible legal

<sup>1</sup> P. Wesley-Smith, *An Introduction to the Hong Kong Legal System*, 3rd ed. (Oxford: Oxford University Press, Hong Kong 1998), chapter 2.

<sup>2</sup> *Ibid.*

<sup>3</sup> The process of legislation will be discussed in Chapter 6.

institutions or departments, including the Court Interpreters' Office, the Land Registry, the Labour Department, the Customs and Excise Department, the Independent Commission Against Corruption and so on. In this sense, the legal system can be viewed as a part of the system of government.

Aside from creating and operating the law, a legal system also contains the laws themselves. In Hong Kong, statutory law is mainly in the form of ordinances and to a lesser extent regulations and by-laws.<sup>4</sup> The other main source of law is case law, namely the judicial decisions made by the courts.<sup>5</sup> Therefore the legal system from this vantage point is a collection of laws.

A legal system cannot be completely appreciated without recognising the ideologies, philosophies and jurisprudence behind the legal system. This is essentially why some legal systems are similar while others differ so greatly. These aspects of the legal system are discussed next.

## Rules and Principles

The law itself is comprised of particular legal rules as contained in legislation and case law. Apart from these specific rules, there are fundamental doctrines or basic principles which underpin the law and the legal system. Such fundamental principles include the rule of law, separation of powers and judicial independence.

### Rule of Law

The rule of law is arguably the foundation of Hong Kong's legal system. It has survived the return of sovereignty over Hong Kong to China<sup>6</sup> and is guaranteed to remain for at least fifty years.<sup>7</sup> The rule of law contains important principles upon which the system functions.

The rule of law has its foundations in the notion of Aristotle that government is best when it is done by law and not by man.<sup>8</sup> This requires

<sup>4</sup> The sources of law will be discussed in Chapter 4.

<sup>5</sup> The courts and doctrine of precedent will be discussed in Chapter 5.

<sup>6</sup> Basic Law, art. 8.

<sup>7</sup> Basic Law, art. 5.

<sup>8</sup> C. A. Bates, *Aristotle's 'Best Regime': Kingship, Democracy and the Rule of Law* (Baton Rouge, LA: Louisiana State University Press 2003).

that individual liberties are ensured by the regulation of behaviour by means of law only and punishment only in accordance with the law.<sup>9</sup> It is the body of principle often represented by Aristotle's famous quotation: 'he is a better ruler who is free from passion than he who is passionate. Whereas the law is passionless, passion must ever sway the heart of man.'<sup>10</sup> There are five basic principles under the modern understanding of the rule of law:

- *Law is the antithesis of arbitrary power.*

This is the key principle of the rule of law, as it prevents government from exercising tyrannical whims, in particular the whim to punish a person who has not breached the law. This principle is famously stated as 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'.<sup>11</sup> Moreover, the law should be certain and consistently applied. The law cannot apply unless it has been created by a legitimate constitutional process.

- *Law is not biased in its application.*

This means that the law should be protected from the partisan interests of its administrators. Judges, therefore, are usually appointed with life tenure to ensure that their decisions are free from political interference. It also contemplates equal access to the judicial system,<sup>12</sup> which entails the provision of services such as legal aid and duty lawyers to people with low income.

- *All persons are equal before the law.*

The traditional symbol for equality before the law is the Greek goddess of justice, Themis.<sup>13</sup> Themis is usually depicted as holding a pair of scales (signifying the tempering of justice with mercy) and wearing a blindfold. Equality before the law is represented by the blindfold. The law should perform its function in a way that is blind to individual characteristics of wealth, gender, class, education, race, religion, creed and political persuasion.

<sup>9</sup> R. Huxley-Binns, J. Martin and T. Frost, *Unlocking the English Legal System*, 5th ed. (London: Routledge 2017).

<sup>10</sup> Aristotle (384–322 BCE), *Politics* (Chicago, IL: Chicago University Press 1984).

<sup>11</sup> A. V. Dicey, *Introduction to the Study of Law of the Constitution*, 10th ed. (Basingstoke: Macmillan Education 1959), p. 202.

<sup>12</sup> Basic Law, art. 35; see also Chapter 11.

<sup>13</sup> See 'Justice' at the Old Bailey. Barnaby's Picture Library.

- *Law must be effective.*  
The law must be able to affect the conduct of the persons it is governing. It is logical that to do this, the obligations imposed by the law must be capable of being understood and obeyed by all the persons it attempts to regulate.
- *Law must be of benefit to society.*  
In order for the law to have longevity and be obeyed, it must be perceived as being advantageous. There must be a careful tempering of law between civil and political rights and duties so that the law is perceived as a desirable vehicle for order in society instead of being interfering and oppressive.

## Separation of Powers

Montesquieu is credited as the founder of the doctrine of the separation of powers,<sup>14</sup> and it is the legacy of his political theory that developed in the tumultuous political climate of revolutionary France.<sup>15</sup> The basic precept of the doctrine is that to prevent the abuse of state power, power should be shared among the executive (Executive Council as well as the Chief Executive), the legislature (Legislative Council) and the judiciary (the courts). This system provides checks and balances on each of the arms of government. The doctrine of the separation of power and its application to both colonial and present day Hong Kong is dealt with in much more detail in Chapter 2.

## Independent Judiciary

The independence of the judiciary is vital to provide the courts and arbiters with immunity and protection from interference by other governmental organisations. In England, the Stuarts were renowned for interference, by threats and bribery of members of the judiciary, and that instigated the Act of Settlement in 1701.<sup>16</sup> This Act introduced some very important provisions for an independent judiciary, and these are now commonplace in most common law jurisdictions. The provisions included life tenure for

<sup>14</sup> The doctrine of the separation of powers will be discussed in detail in Chapter 3.

<sup>15</sup> M. Ritches (ed.), *The Political Theory of Montesquieu* (M. Ritches, trans.) (Cambridge: Cambridge University Press 1977).

<sup>16</sup> Act of Settlement 1701 (UK).

judges, inability of anyone to dismiss a judge on anything other than legal grounds, and immunity of salaries from government interference.<sup>17</sup>

In Hong Kong, judicial independence is maintained by the constitutional precepts contained in Chapter IV of the Basic Law. The Basic Law provides that the courts of Hong Kong exercise their power independently, the application of this being that members of the judiciary are immune from legal action in the performance of their judicial function.<sup>18</sup> The Basic Law also provides that members of the judiciary are free from political interference by guaranteeing their tenure (their appointment to the judiciary). Judges are only to be removed for misbehaviour or inability to perform, and that can only be achieved through a tribunal of judges, including the Chief Justice.<sup>19</sup> Therefore, the judiciary regulates itself. It is both the intention and the consequence of this system that the regulation of the judiciary also remains independent of legislative or executive interference.<sup>20</sup>

Judicial independence is also protected by the Basic Law, which vests the power of final adjudication in the Court of Final Appeal,<sup>21</sup> although this is the subject of much academic and legal debate. Many argue that the Basic Law contains an inconsistency regarding where this power of final adjudication is actually vested. As mentioned above, art. 82 vests this power in the Court of Final Appeal, yet a conflict potentially exists with art. 158, which vests the final power of interpretation of the Basic Law itself with the Standing Committee of the National People's Congress (NPCSC) of the PRC. Many argue that the final power of adjudication is then effectually that of the NPCSC, is delegated by them to the Court of Final Appeal and such delegated power exercisable by the Court of Final Appeal is limited to those cases within the autonomy of the HKSAR, not including those cases that concern the responsibilities of the Central People's Government or the relationship between the central authorities and the HKSAR.<sup>22</sup> This raises key questions about the legitimacy of claims to the effectual independence of the Hong Kong judiciary in practice.

<sup>17</sup> P. S. Atiyah, *Law and Modern Society*, 2nd ed. (New York, NY: Oxford University Press 1995), p. 13.

<sup>18</sup> Basic Law, art. 85.

<sup>19</sup> Basic Law, art. 89.

<sup>20</sup> For further reading, see B. F. C. Hsu, 'Judicial Independence under the Basic Law' (2004), *Hong Kong Law Journal* 34, 279.

<sup>21</sup> Basic Law, art. 82.

<sup>22</sup> L. Feng, 'The Development of Jurisprudence of the Court of Final Appeal in Basic Law Litigation' (2001-2), *Journal of Chinese and Comparative Law* 5, 21. See further G. Zhu, 'Inter-Regional Conflict of Laws under "One Country, Two Systems": Revisiting Chinese

The judiciary, however, does enjoy independence in certain respects. The members of the judiciary enjoy security of commission (salary), security of tenure (appointment) and immunity from civil litigation in the performance of their duties. All of these provisions are constitutionally protected and assist in the maintenance of many fundamental characteristics of an independent judiciary.

## Legal Institutions

There are three main categories of legal institutions in Hong Kong: legislative, judicial and executive institutions.<sup>23</sup> These institutions have the functions of enacting, enforcing, administering, interpreting, applying, amending and repealing laws. To understand these functions, it is necessary to understand how these institutions operate in their particular constitutional context.

### Legislative Institutions

The Basic Law provides for the primary legislative body in Hong Kong to be the Legislative Council.<sup>24</sup> The establishment of the Legislative Council and its powers and functions are detailed in arts. 66 to 79 of the Basic Law. There are ten specific heads of power outlined in art. 73, and they include the making, amending and repealing of laws in accordance with the Basic Law and legal procedure;<sup>25</sup> fiscal responsibilities (such as budgets<sup>26</sup> and taxation<sup>27</sup>); enforcing the idea of responsible government (by asking questions about the work of the government,<sup>28</sup> debating matters of public interest,<sup>29</sup> keeping check on the policy initiatives of the Chief Executive<sup>30</sup> and being available to Hong Kong residents with complaints<sup>31</sup>); the

*Legal Theories and Chinese and Hong Kong Law with Special Reference to Judicial Assistance* (2002), *Hong Kong Law Journal* 32, 615.

<sup>23</sup> Basic Law, Chapter IV.

<sup>24</sup> Basic Law, art. 66.

<sup>25</sup> Basic Law, art. 73(1).

<sup>26</sup> Basic Law, art. 73(2).

<sup>27</sup> Basic Law, art. 73(3).

<sup>28</sup> Basic Law, art. 73(5).

<sup>29</sup> Basic Law, art. 73(6).

<sup>30</sup> Basic Law, art. 73(4).

<sup>31</sup> Basic Law, art. 73(8).

appointment and dismissal of members of the judiciary<sup>32</sup> (in accordance with procedure); and a legal procedure for the dismissal of members of the Legislative Council held not to possess the confidence of the other members.<sup>33</sup> The detailed powers and functions of the Legislative Council are defined in the Legislative Council Ordinance<sup>34</sup> and the Legislative Council (Powers and Privileges) Ordinance.<sup>35</sup> The most significant restriction on the Legislative Council involves matters that may be the subject of legislation initiated by the legislature.<sup>36</sup> The process of legislation in Hong Kong is detailed in Chapter 6.

Not all law is, in practice, created by the Legislative Council or the extended legislative institutions which have jurisdiction to do so. For efficacy of government, the Legislative Council is able to delegate its powers to make law by creating subsidiary legislation which assigns this power to an authorised body from the executive branch.<sup>37</sup>

### Judicial Institutions

The main institution engaged in the exercise of judicial power in Hong Kong is the courts. This is in accordance with the structure<sup>38</sup> outlined by the Basic Law which provides that the courts at all levels will be the judiciary of the region.<sup>39</sup> It is the main function of the courts to administer justice in the region in both criminal and civil matters.

The highest court in Hong Kong is the Court of Final Appeal (CFA), which enjoys the power of final adjudication.<sup>40</sup> The CFA was established after the handover, replacing the Privy Council as Hong Kong's highest appellate court. The legitimacy of its power is derived from art. 82 of the Basic Law and is practised in accordance with the Court of Final Appeal

<sup>32</sup> Basic Law, art. 73(7).

<sup>33</sup> Basic Law, art. 73(9).

<sup>34</sup> Legislative Council Ordinance (Cap. 542).

<sup>35</sup> Legislative Council (Powers and Privileges) Ordinance (Cap. 382).

<sup>36</sup> Y. Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press 1997), p. 252.

<sup>37</sup> Basic Law, art. 62(5).

<sup>38</sup> Chapter IV of the Basic Law defines the political structure of the Hong Kong Special Administrative Region.

<sup>39</sup> Basic Law, art. 80.

<sup>40</sup> Basic Law, art. 82.

Ordinance.<sup>41</sup> Other courts in Hong Kong include the Court of Appeal, the Court of First Instance, the District Court and the Magistrates' Courts. Besides the courts, Hong Kong has established certain tribunals to deal with specific matters. The court system in Hong Kong as well as the doctrine of precedent is discussed in Chapter 5.

### Executive Institutions

The executive institution in Hong Kong is the Hong Kong Special Administrative Region (HKSAR) Government.<sup>42</sup> This includes the Department of Administration, Department of Finance, Department of Justice and various bureaus, divisions and commissions.<sup>43</sup> The structure of this government will be examined in greater detail in subsequent chapters which follow the legislative and political process of law-making in Hong Kong. This section will look at some of the executive institutions that are particularly relevant to the legal system.

The most relevant of these executive authorities to a study of the legal system of Hong Kong is the Department of Justice. The head of the Department of Justice is the Secretary for Justice. The Secretary for Justice is a member of the Executive Council and the principal legal adviser to the Chief Executive, the government and various individual governmental departments and agencies. The Department of Justice comprises six divisions:<sup>44</sup>

- The Prosecutions Division is headed by the Director of Public Prosecutions. The main duties of this division are to appear for the government in the prosecution of criminal offenders and to advise government law enforcement agencies.
- The Civil Division is responsible for providing legal advice on civil law matters to all government bureaus and departments. It is also responsible for representing the government in civil litigation and arbitrations.

<sup>41</sup> Court of Final Appeal Ordinance (Cap. 484).

<sup>42</sup> Basic Law, art. 59.

<sup>43</sup> Basic Law, art. 60.

<sup>44</sup> Refer to the homepage of the Department of Justice of the Government of the Hong Kong Special Administrative Region, available at [www.doj.gov.hk/eng/about/organisationtoc.html](http://www.doj.gov.hk/eng/about/organisationtoc.html).

- The Law Drafting Division is responsible for the drafting of government legislation. The drafting counsel is required to attend the meetings of both the Legislative and Executive Councils in the final stages of the legislative process.
- The Legal Policy Division is primarily responsible for giving legal policy advice to the government. This advice will extend to issues such as the administration of justice, human rights and other issues of constitutionality. This division also contains a special unit that is devoted to the understanding of the laws of the PRC.
- The International Law Division provides legal advice on public international law to the government and assists in its negotiation of bilateral and international agreements.
- The Administration and Development Division deals with all the administrative matters of the Department.

The Legal Aid Department also plays an important part in the legal system in both a procedural and a substantive role. It is a government institution which was established to provide legal representation in both civil and criminal cases to any person who has reasonable grounds for pursuing or defending a legal action, but is prevented from doing so by lack of means.<sup>45</sup> Other institutions such as the Hong Kong Police Force, the Independent Commission Against Corruption and the Correctional Services Department are law enforcement authorities that are integral parts of the Hong Kong legal system. Their purpose is to enforce the laws of Hong Kong, though their specific roles and methods differ in accordance with their specific missions. Further discussion on these law enforcement agencies and the prosecution can be found in Chapter 8.

### Legal Personnel

The normal operation of any legal system requires the function and co-operation of a large number of personnel. Some of their roles are political, such as the Chief Executive, and others are administrative, such

<sup>45</sup> The Legal Aid Ordinance (Cap. 91) sets out the criteria that the Department considers when assessing a candidate's eligibility for legal aid.

as a jury member or court bailiff. Some of the key players in the Hong Kong legal system are discussed below.

### The Chief Executive

The Chief Executive is the head of the HKSAR government.<sup>46</sup> Because of this political position, the Chief Executive has a high degree of involvement in the legal system, particularly in the law-making process. According to the Basic Law, the Chief Executive can exercise the powers and functions of his/her office to implement the Basic Law and other laws in Hong Kong.<sup>47</sup> The Basic Law also affords the Chief Executive the power to refuse and return any bills passed by the Legislative Council which, at the discretion of the Chief Executive, are deemed to be incompatible with the overall interests of the government.<sup>48</sup> The Chief Executive, therefore, holds a significant power in the law-making process: an effectual veto power. The Chief Executive enjoys some influence on the application and enforcement of laws. The Basic Law vests powers in the Chief Executive to appoint and remove (on legal grounds) judges from the courts at all levels<sup>49</sup> as well as to nominate principal officials including the Secretary for Justice and Commissioner of Police for appointment by the Central People's Government.<sup>50</sup> This power is, however, by no means unlimited and unchecked. According to the Basic Law, the Department of Justice can control criminal proceedings free from any interference,<sup>51</sup> and the Chief Executive's power to appoint and remove judges is restricted and cannot be exercised arbitrarily.<sup>52</sup>

### Secretary for Justice

The Secretary for Justice is the head of the Department of Justice and must be nominated by the Chief Executive for appointment.<sup>53</sup> The role of the

<sup>46</sup> Basic Law, art. 43.

<sup>47</sup> Basic Law, art. 48(2).

<sup>48</sup> Basic Law, art. 49.

<sup>49</sup> Basic Law, art. 48(6).

<sup>50</sup> Basic Law, art. 48(5).

<sup>51</sup> Basic Law, art. 63.

<sup>52</sup> Basic Law, arts. 88, 89.

<sup>53</sup> Basic Law, art. 48(5).

Secretary for Justice is multifarious and includes acting as the principal legal adviser to the government; having the sole responsibility in deciding to prosecute criminal cases; and being the nominal defendant in all civil actions against the government. The Secretary for Justice is the 'guardian of the public interest'. This means that where necessary, the Secretary for Justice may act for the public and apply for judicial review of issues affecting public or civil rights. The Secretary for Justice is also the Protector of Charities and thus is able to bring an action for a charitable or public trust.<sup>54</sup>

### Legislators

The legislators in Hong Kong are the members of the Legislative Council. The Basic Law restricts this membership to Chinese citizens, who are permanent residents of Hong Kong with no right of abode in any other foreign country.<sup>55</sup> Permanent residents of Hong Kong who are not of Chinese nationality or who have the right of abode in another country may be elected to the Legislative Council, provided that the proportion of such members does not exceed 20 per cent of the total composition of the Legislative Council.<sup>56</sup> The method of Legislative Council election is specified in Annex II of the Basic Law, 'Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures'.

### Judges and Members of the Judiciary

Judges are the arbiters in the legal system. This role includes the hearing of cases before them, application of the relevant law and the direction of juries, among many other functions. In Hong Kong, all judges are appointed by the Chief Executive<sup>57</sup> on the recommendation of an independent commission composed of local judges, members of the legal profession and eminent persons from beyond the legal sector.<sup>58</sup> In Hong Kong, the highest-ranking

<sup>54</sup> Department of Justice, *The Legal System in Hong Kong* (Hong Kong: Department of Justice 2008) p. 38.

<sup>55</sup> Basic Law, art. 67.

<sup>56</sup> *Ibid.*

<sup>57</sup> Basic Law, art. 48(5).

<sup>58</sup> Basic Law, art. 88.

judge is the Chief Justice of the Court of Final Appeal and he/she is ultimately responsible for all judicial matters. The Chief Justice must be a Chinese citizen who is a permanent resident of Hong Kong with no right of abode in any foreign country.<sup>59</sup>

Judges to the High Court are appointed by the Chief Executive in accordance with the High Court Ordinance.<sup>60</sup> The Court of Appeal consists of the Chief Judge of the High Court and Justices of Appeal appointed by the Chief Executive.<sup>61</sup> Under the same ordinance, the Court of First Instance shall consist of the Chief Judge of the High Court, judges appointed by the Chief Executive and the deputy judges appointed by the Chief Justice.<sup>62</sup> Appointment to the District Court is similarly qualified under the District Court Ordinance.<sup>63</sup> The appointment of magistrates is regulated by the Magistrates Ordinance.<sup>64</sup>

## Juries

The Basic Law provides that the principle of trial by jury should be maintained in Hong Kong.<sup>65</sup> The jury does not directly apply the law to factual situations; rather they are the arbiters of fact in a trial, determining the most probable fact scenario from competing accounts. This determination is based on evidence put to them at the trial. Jurors are private citizens who have been sworn to hear and pass verdict on an accused person in criminal trials (which are conducted in the Court of First Instance) and in some civil actions.

In Hong Kong, a jury typically consists of seven members of the community. The qualifications for jury service are found in the Jury Ordinance and include qualifications based on age, language and character.<sup>66</sup> Every person who is qualified under the ordinance has an obligation to serve unless they can prove they fall into one of the exceptions to jury service

<sup>59</sup> Basic Law, art. 90; Hong Kong Court of Final Appeal Ordinance (Cap. 484), s. 6.

<sup>60</sup> High Court Ordinance (Cap. 4).

<sup>61</sup> High Court Ordinance (Cap. 4), s. 5.

<sup>62</sup> High Court Ordinance (Cap. 4), s. 4.

<sup>63</sup> District Court Ordinance (Cap. 336).

<sup>64</sup> Magistrates Ordinance (Cap. 227).

<sup>65</sup> Basic Law, art. 86.

<sup>66</sup> Jury Ordinance (Cap. 3), s. 4.

(also found in the ordinance).<sup>67</sup> Exceptions exist for the Chief Executive, members of the Legislative Council, certain public officers (including legal officers and public officers in law enforcement agencies), barristers and solicitors, medical practitioners, full-time students and so forth.

Each week, the Registrar of the High Court draws at random a number of jurors from the List of Common Jurors. If a person is selected, the court will send him/her a summons and request his/her assistance in court on a particular day. The court officials then select seven jurors by ballot on the first day of the trial for service and the balance of jurors are excused.<sup>68</sup> Legal counsel for either party are allowed to object to a particular selection of jury in order to protect the interests of their party.<sup>69</sup> Jurors are given immunity from having their employment terminated due to their performance of jury service<sup>70</sup> and are entitled to monetary compensation for their service in a trial.<sup>71</sup>

## Barristers and Solicitors

Legal practitioners perform a variety of professional legal duties for their clients. Some of these include representing litigants during a trial, giving legal advice, drafting contracts, performing conveyancing work in transactions and administering wills and estates. In Hong Kong, the Legal Practitioners Ordinance<sup>72</sup> regulates the administration and registration of these professionals. The legal profession of Hong Kong is further discussed in Chapter 11.

The legal profession in Hong Kong is split between barristers and solicitors, and each has a separate requirement for admission. The legal academic training for both barristers and solicitors is the same in Hong Kong. Admission into either field is possible after obtaining a Bachelor of Laws degree (LLB) from the University of Hong Kong, City University of Hong Kong or The Chinese University of Hong Kong and completion of the Postgraduate Certificate in Laws (PCLL) programme at any of these institutions. Graduates who hold a Bachelor of Laws degree from a university other than one of these three universities in Hong Kong may also seek to complete the PCLL in order to be admitted as either a barrister or solicitor. However, they are required to

<sup>67</sup> Jury Ordinance (Cap. 3), s. 5.

<sup>68</sup> Jury Ordinance (Cap. 3), s. 21.

<sup>69</sup> Jury Ordinance (Cap. 3), s. 29.

<sup>70</sup> Jury Ordinance (Cap. 3), s. 33.

<sup>71</sup> Jury Ordinance (Cap. 3), s. 31.

<sup>72</sup> Legal Practitioners Ordinance (Cap. 159).

demonstrate competence in five core subjects, Civil Procedure, Criminal Procedure, Commercial Law, Evidence and Business Associations, and three top-up subjects, Hong Kong Constitutional Law, Hong Kong Legal System and Hong Kong Land Law before they can undertake the PCLL programme.<sup>73</sup> Those who have an undergraduate degree from another faculty (non-law degree) can choose to either complete the Juris Doctor (JD) programme offered by the above educational institutions or obtain the Graduate Diploma in English and Hong Kong Law (Common Professional Examination) offered by HKU Space in association with Manchester Metropolitan University before admission to the PCLL programme. Once a PCLL is obtained, admission to the Bar (as a barrister) requires at least a twelve-month pupillage in Hong Kong.<sup>74</sup> For admission as a solicitor, a graduate must work as a trainee solicitor at a qualified law firm for two years.<sup>75</sup> Once admitted to either side of the profession, it is possible to switch over, provided it is done so in compliance with the Legal Practitioners Ordinance.<sup>76</sup>

### Academic Personnel

This category involves all the professors, lecturers and researchers of law at the universities. These academics educate the future lawyers and conduct research into developing and new areas of the law. They are also invaluable in contributing to jurisprudence and in critiquing of the legal system.

### Historical Development of Hong Kong's Legal System

This section gives a brief account of the historical development of the legal system of Hong Kong. It helps to illustrate how the common law system was imported from England to Hong Kong.

### The Legal System upon Colonisation

Prior to the British colonisation of Hong Kong in 1841, the territory, with only a few thousand inhabitants (villagers and fishermen), existed as part

<sup>73</sup> For details, please refer to the information prepared by the PCLL Conversion Examination and Administration Limited, available at [www.pcea.com.hk/package.html](http://www.pcea.com.hk/package.html).

<sup>74</sup> Barristers (Qualification for Admission and Pupillage) Rules (Cap. 159AC), s. 10.

<sup>75</sup> Trainee Solicitors Rules (Cap. 159J), s. 6.

<sup>76</sup> Legal Practitioners Ordinance (Cap. 159).

of the Chinese Empire under the Qing Dynasty, with Chinese laws (under the imperial code) and customs applying in the territory. Following the First Opium War between China and Britain, Hong Kong Island was ceded to Britain under the Treaty of Nanking 1842. Kowloon was ceded under the Convention of Peking 1860 after the Second Opium War, while the New Territories was acquired by the British for a ninety-nine-year lease under the Second Convention of Peking 1898.

Upon acquisition of sovereignty over Hong Kong, the British took steps to set up its own legal system and to apply English law in Hong Kong. Under English legal principles, the acquisition of a colony by conquest or cession does not automatically lead to the application of English law in the colony. The existing legal system of the colony applies unless altered by the British Crown.<sup>77</sup> In Hong Kong, this was first effected (to a degree) by two proclamations of Captain Charles Elliot, the Chief Superintendent of Trade and Plenipotentiary in China, declaring that the local Chinese were to be governed by 'the laws and customs of China',<sup>78</sup> while British subjects and other foreigners would be governed by 'the principles and practice of British law'.<sup>79</sup> The reception of English law was formalised following the proclamation of the Charter of the Colony of Hongkong by the Queen of England on 5 April 1843 pursuant to the Crown's prerogative powers. Under that Charter, the Governor of the Colony of Hong Kong, with the advice of the Legislative Council, was granted 'power and authority to make and enact all such Laws and Ordinances as may from time to time be required for the peace, order, and good government of the said Colony of Hongkong'.<sup>80</sup> The Charter (and its successor instrument, the Hong Kong Letters Patent 1917, supplemented by the Hong Kong Royal Instructions 1917<sup>81</sup>) formed the written constitution<sup>82</sup> for Hong Kong under British rule.

<sup>77</sup> *Campbell v. Hall* (1774) 1 Cowp 204, 98 ER 1045.

<sup>78</sup> Proclamations dated 1 February 1841 (issued jointly by Commodore Sir Bremer and Captain Elliot) and 2 February 1841 (issued by Captain Elliot); see J. W. Norton-Kyshe, *History of the Laws and Courts of Hong Kong: From the Earliest Period to 1898: Volume 1*, revised ed. (Hong Kong: Vetch and Lee Ltd 1971), pp. 3-6. See also D. M. E. Evans, 'Common Law in a Chinese Setting' (1971), *Hong Kong Law Journal* 1, 9.

<sup>79</sup> Proclamation dated 2 February 1841.

<sup>80</sup> Charter of the Colony of Hongkong, reproduced in Norton-Kyshe (n. 78), p. 21.

<sup>81</sup> These documents are reproduced in P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, 2nd ed. (Hong Kong: Longman 1994), Appendices 1 and 2.

<sup>82</sup> On the concept of a constitution, see Chapter 4.

The dominant motive for British acquisition of Hong Kong was trade, and the British wished to establish a base for the protection and expansion of British economic interests in China.<sup>83</sup> Order and stability were necessary to facilitate British trade, and the introduction of English law into Hong Kong was done predominantly for the purpose of protecting the private and commercial interests of the British. Application of English law in the colony was seen to be important to ensure that British subjects were governed by laws familiar to them.<sup>84</sup> Yet although initially English law was only applied to the British and foreign persons in Hong Kong, the Supreme Court Ordinance (No. 15 of 1844) extended the application of English law to all persons in Hong Kong, including the local Chinese population. Munn has suggested that major factors leading to this policy included the following: the need to assert British sovereignty over the colony; rapid immigration and uncontrolled crime; and the view that Chinese methods of justice were inferior.<sup>85</sup> Thus, the extension of English law to the Chinese in Hong Kong is said to have been premised on both the element of control of the local population and the benevolent purpose of improving the conditions of the locals.<sup>86</sup>

### Legal Institutions and the Rule of Law in Colonial Hong Kong

The generally held view today is that the laws and legal system imported from the British constitute one of the more important and positive legacies of British rule in Hong Kong. It is not doubted that the legal system set up under British rule has provided for stability and public safety, and has facilitated the economic developments which have led the territory to become one of the major international commercial centres by the end of

<sup>83</sup> R. Buckley, *Hong Kong: The Road to 1997* (Cambridge: Cambridge University Press 1997), p. 1; A. Y. S. Cheung, 'The Paradox of Hong Kong Colonialism' (1996), *Canadian Journal of Law and Society* 11, 63.

<sup>84</sup> E. Marcks, 'English Law in Early Hong Kong: Colonial Law as a Means for Control and Liberation' (2000), *Texas International Law Journal* 35, 265.

<sup>85</sup> C. Munn, *Anglo-China: Chinese People and British Rule in Hong Kong, 1841-1880* (Surrey: Curzon 2001), pp. 165-166.

<sup>86</sup> Marcks (n. 84), p. 274; C. Jones and J. Vagg, *Criminal Justice in Hong Kong* (London: Routledge-Cavendish 2007), p. 3.

the twentieth century.<sup>87</sup> However, academics and commentators have also pointed out that behind the popular image of the beneficence of the legal system inherited from the British and of its importance in securing the prosperity of Hong Kong, there were also authoritarian and repressive aspects of the legal system and significant flaws and defects which have created inequality and injustice in Hong Kong.<sup>88</sup>

Certainly, the formal institutions of the English legal system and the formal aspects of the rule of law were effectively transplanted to Hong Kong in the early days of colonial rule. The 1843 Charter that imported English law into Hong Kong also created the Legislative Council, which, acting together with the Governor, had the function of making laws for the colony. The court and penal system were quickly established, with a Chief Magistrate appointed in 1841, a police force set up and the Supreme Court created in 1844.<sup>89</sup> Yet despite the creation of the formal institutions necessary for a legal system and the rule of law, the reality on the ground left much to be desired. Professionalism and competence was lacking, with the police force unreliable and corrupt,<sup>90</sup> and judicial officers and lawyers often having less than adequate knowledge of the law.<sup>91</sup> The practice of the law in the courts looked far different from that in their English counterparts,<sup>92</sup> with the procedural protections and rules of evidence present in the English courts often being ignored.<sup>93</sup> Moreover, there was much bias against the Chinese in both the court system and the laws themselves. Repressive laws directed at control of the Chinese were enacted and policed heavily; there was bias in the jury and judges; and harsh forms of punishments were co-opted from the Chinese legal system to punish Chinese offenders.<sup>94</sup>

<sup>87</sup> Marcks (n. 84), p. 269; Jones and Vagg (n. 86), p. 8; M. K. Chan, 'The Imperfect Legacy: Defects in the British Legal System in Colonial Hong Kong' (1997), *University of Pennsylvania Journal of International Economic Law* 18, 133.

<sup>88</sup> See, e.g., Chan (n. 87).

<sup>89</sup> See Munn (n. 85), pp. 113-203.

<sup>90</sup> Munn (n. 85), pp. 120-121; Jones and Vagg (n. 86), pp. 52-56.

<sup>91</sup> Jones and Vagg (n. 100), pp. 132, 135.

<sup>92</sup> Munn (n. 85), p. 169.

<sup>93</sup> *Ibid.*, p. 118.

<sup>94</sup> *Ibid.*, pp. 125-251; Jones and Vagg (n. 86), pp. 133-168; Marcks (n. 84); R Klein, 'Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong' (1995), *Hastings International & Comparative Law Review* 18, 223.