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## Introduction

The state regulates almost every aspect of our lives. The tentacles of regulation extend far and wide: education, health, commerce, finance, employment, taxation, policing, transport, housing, telecommunications, construction, waste management, pensions, the family, science and technology, immigration, entertainment – almost no area is off limits. The complexities of administering the apparatus of state has resulted in a proliferation of departments, agencies and officials, and the emergence of an extensive and powerful bureaucracy. From the Department of Health to the Inland Revenue Department, and District Councils to licensing boards, a smorgasbord of powers are vested in a wide range of officials from the Chief Executive to junior-level administrators. These powers can doubtless be exercised for the common good, improving and enhancing the health, education, well-being, security and prosperity of the populace. The institutions, stability and resources of the state present a considerable opportunity for the advancement of the public interest and public welfare.

However, with every power conferred on an institution or official comes an opportunity for abuse or misuse; whether intentional or inadvertent. Corruption, favouritism, arbitrariness, selective enforcement of rules, pursuit of private motives in the exercise of public power, excessive and unreasonable proceduralism, oppression, unfair treatment, pursuit of ulterior motives in the exercise of discretion – these are violations not only of the rule of law but also of the ethics that inform it. Autocratic, oppressive or unreasonable behaviour among frontline officials, even when seemingly mundane, is worthy of our attention and scrutiny. The licensing or planning body which fails to treat like applications alike; the public official who refuses to answer reasonable questions which it is their duty to answer; the public body which ignores enquiries and requests; the tribunal which is biased or which does not observe procedural fairness; the police officer whose personal animosity towards a person is apparent in his official conduct; the customs official who selects for a full body search a man by reason of his ethnicity. The excesses of the state should not go unchecked, even on this more quotidian level.

Those who govern are not always, and apparently not often, driven to act in such a way. Their powers are more likely to be inadvertently misused than deliberately abused. Mistakes can be made in administrative procedures,

whether determining the eligibility of an applicant for a licence, or hearing objections to a planning proposal. Decision makers can misunderstand the scope of their legal powers, and can commit errors in applying their powers. They might erroneously think that their power to award amusement game licences carries with it a power to censure the kinds of games that can be operated in amusement game premises,<sup>1</sup> or that by removing a professional's registration status in accordance with a disciplinary code there is no need to afford him or her an oral hearing. They might regard themselves as under no obligation to provide reasons for a decision taken, or think they are justified in making a particular decision as a result of a lack of resources. These acts and decisions might be committed unwittingly and without ill motive, and the official might genuinely be doing what he or she thinks to be right and in the public interest.

Administrative law is essentially directed at these abuses and misuses of public power. Its function is to regulate the relationship between public administrators and those who must deal with them; putting right abuse and misuse. Judicial review is one of the most potent aspects of administrative law and is the main focus of this book. It is the mechanism by which the courts ensure that bodies act in accordance with their public law duties. All decision makers face legal limits on the scope of their decision-making power. No decision maker has unlimited discretion. To govern is not to be immune from compliance with the law, a central principle of the rule of law. The courts, through judicial review, ensure that public bodies and officials act and decide lawfully; otherwise, their acts and decisions can be struck down.

This gives the courts great power, and their supervisory jurisdiction must be exercised with discipline. Importantly, judicial review is not an avenue of appeal. It is concerned with the legality of acts and decisions, not their merits.<sup>2</sup> Decision makers at all levels can make good decisions or bad decisions, but this is in principle not the business of the courts. The merits of decisions are matters for political accountability; through elections, public consultations, media scrutiny, protests and public discourse. The considerable power of unelected judges in judicial review is to a great extent tolerable because it is exercised with discipline: just as courts must be ready and willing to intervene whenever legal obligations have not been met, so must they refrain from interfering when the challenge is fundamentally not one of law and legal obligation.

In this way the rule of law is upheld in accordance with the separation of powers. The judiciary ensures that the legislature and the executive (and even the judiciary itself) comply with the law, and provide an avenue for legal redress where they do not. The rule of law is promoted not only by the courts measuring the legality of decision making against the Basic Law and legislation but also by the imposition of common law standards on public administration

<sup>1</sup> See *Wong Kam Kuen v Commissioner for Television and Entertainment Licensing* [2003] 3 HKLRD 596 (CA).

<sup>2</sup> Though it will be seen that the boundary between legality and merits is sometimes rather thin.

which are understood to promote laudable ethical conceptions of governance. Often the rule of law is used vaguely as a term, certainly in politics and perhaps also in law. Whilst there is scope for reasonable disagreement on its precise form and meaning, it is an essential concept, rather than a technical one.<sup>3</sup> The ways in which the term may be used, sometimes misused and perhaps even abused, should not be permitted to undermine the seriousness of the core issue, namely, the robust protection of individuals against unlawful acts of the state. Sight should not be lost of the rule of law ideal in the law and legal system, nor of how fragile the rule of law can be, and how subtly it can be eroded. Judicial review is a cornerstone of the rule of law, only gaining importance in Hong Kong. As Li CJ acknowledged, extra-judicially:

It is not an exaggeration to say that the phenomenon of judicial review has redefined the legal landscape. . . . It would not be right for judicial review to be viewed negatively as a hindrance to government. On the contrary, it should be seen as providing an essential foundation for good governance under the rule of law.<sup>4</sup>

Furthermore, judicial independence is as critical to the utility of judicial review as it is to the integrity of the legal system. Without judicial independence, the promise of judicial review for the rule of law and the protection of individual rights would be seriously diminished. An effective system of legal aid is also important to ensure that individuals can access the courts within which to assert their rights and have the wrongs of public bodies subject to judicial scrutiny. These protections should be guarded against impairment and erosion.

Administrative law is broader, however, than judicial review. It includes an array of other mechanisms for holding public administrators to account in accordance with particular standards of governance. Administrative tribunals, the Ombudsman, the Legislative Council Redress System, Commissions of Inquiry, the Independent Commission Against Corruption, the Equal Opportunities Commission, the Privacy Commissioner for Personal Data and the Audit Commission are just some of the other means by which public bodies can be scrutinised and challenged, and they are also addressed in this book. The role that each of these institutions plays in making life tolerable in a democratically weak system is even more keenly felt. Regardless of one's view on the role, place and extent of democracy in the territory, Hong Kong would be a worse place without the robust system of administrative law that it presently enjoys. The system must not be taken for granted; it can be further improved and strengthened, and it should be protected against diminution. A thriving system of administrative law provides lifeblood to the rule of law, and its fortification and improvement can materially enhance fairness, transparency, accountability and justice within and against the state.

<sup>3</sup> See pp.30–31.

<sup>4</sup> Andrew Li CJ, speech at the Ceremonial Opening of the Legal Year 2007.

## **Part I**

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# **The Constitutional and Administrative Context**

## 2

# Governance and Administration in Hong Kong

## Central Government

### Chief Executive

The Chief Executive is firmly at the heart of government in Hong Kong,<sup>1</sup> retaining much of the centralised power and authority of the pre-Handover Governor. She appoints members of the Executive Council, civil servants, judges and the majority of administrative tribunal members. She has, *inter alia*, the power to conduct external affairs on behalf of the Hong Kong Special Administrative Region (HKSAR) within the scope of her remit, sign bills and budgets passed by the Legislative Council, approve the introduction of motions regarding revenue and expenditure to the Legislative Council, pardon persons convicted of criminal offences or commute their penalties, and handle petitions and complaints.<sup>2</sup> The Chief Executive must also act as a key link between Hong Kong and the Mainland, and is accountable to the Central People's Government.<sup>3</sup>

In order to be eligible for appointment as Chief Executive, the individual must be a Chinese citizen not less than forty years of age who is a permanent resident of Hong Kong with no right of abode in any foreign country, and who has ordinarily resided in Hong Kong for a continuous period of not less than twenty years.<sup>4</sup> The Basic Law also requires that the Chief Executive is a person of integrity, dedicated to his or her duties.<sup>5</sup> The manner of the Chief Executive's appointment is a source of controversy and tension in Hong Kong. The Basic Law provides that:

The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government. The method for selecting the Chief

<sup>1</sup> Article 48(1) of the Basic Law empowers the Chief Executive to lead the Government of the HKSAR; and Article 60(1) provides that the Chief Executive shall be the head of Government in the HKSAR.

<sup>2</sup> These powers have the backing of the Basic Law, Arts.48 and 55. The Chief Executive nominates persons for appointment as Principal Officials, and reports the same to the Central People's Government for appointment – Basic Law, Art.48(5).

<sup>3</sup> *Id.*, Art.43(2).      <sup>4</sup> *Id.*, Art.44.      <sup>5</sup> *Id.*, Art.47(1).

Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The specific method for selecting the Chief Executive is prescribed in Annex I: “Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region”.<sup>6</sup>

Annex I of the Basic Law currently provides that the Chief Executive is elected by a twelve-hundred-member Election Committee<sup>7</sup> comprised of members from the following sectors:

Industrial, commercial and financial sectors	300
The professions	300
Labour, social services, religious and other sectors	300
Members of the Legislative Council, representatives of members of the District Councils, representatives of the Heung Yee Kuk, Hong Kong deputies to the National People’s Congress, and representatives of Hong Kong members of the National Committee of the Chinese People’s Political Consultative Conference	300

A candidate for the office of Chief Executive may be nominated by not fewer than 150 members of the Election Committee, and each member may nominate only one candidate.<sup>8</sup> The Election Committee votes by secret ballot on a one-person, one-vote basis, and the winning candidate is elected as Chief Executive and appointed by the Central People’s Government for a period of five years.<sup>9</sup> A person may not serve for more than two consecutive terms as Chief Executive.<sup>10</sup> The approach of the Central Authorities has been cautious in the inching of the system towards electing the Chief Executive by universal suffrage. The National People’s Congress Standing Committee (NPCSC) decided that the Chief Executive “has to be a person who loves the country and loves Hong Kong . . . a basic requirement of the policy of ‘one country, two systems’”, and

<sup>6</sup> *Id.*, Art.45.  
<sup>7</sup> The Electoral Committee comprised 1,194 members in the most recent selection of the Chief Executive, in 2017.  
<sup>8</sup> Basic Law, Annex I; Amendment to Annex I to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China Concerning the Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region (approved at the Sixteenth Session of the Standing Committee of the Eleventh National People’s Congress on 28 August 2010); Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (adopted at the Tenth Session of the Standing Committee of the Twelfth National People’s Congress on 31 August 2014).  
<sup>9</sup> Basic Law, Art.46 and Annex I.      <sup>10</sup> *Id.*, Art.46.

proposed that the Chief Executive be selected by a nominating committee similar in composition to the existing Election Committee. The nominating committee would then nominate two to three candidates for the office of Chief Executive, with each candidate being required to have the endorsement of more than half of all members of the nominating committee. The ordinary electorate would then have the right to vote on the nominated candidates.<sup>11</sup> Although described by the Standing Committee as a measure implementing universal suffrage, it was an unorthodox understanding of universal suffrage, and the reform proposal was rejected by the Legislative Council in June 2015. The most recent Chief Executive election, held in March 2017, was therefore operated using the same system as that for the immediately preceding Chief Executive election. Whilst the Chief Executive is therefore technically “elected”, it is election by a remarkably small and select electorate, comprising less than approximately 0.017 per cent of the Hong Kong population. The Chief Executive may be impeached by the Legislative Council, with the final decision resting with the Central People’s Government.<sup>12</sup>

### Executive Council and Chief Executive-in-Council

The Executive Council is designated by the Basic Law as “an organ for assisting the Chief Executive in policy-making”.<sup>13</sup> Its members are appointed by the Chief Executive “from among the principal officials of the executive authorities, members of the Legislative Council and public figures”.<sup>14</sup> They

<sup>11</sup> Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (adopted at the Tenth Session of the Standing Committee of the Twelfth National People’s Congress on 31 August 2014). It was explained that “patriots” must be the “mainstay” of the principle of “Hong Kong people administering Hong Kong”, and that there were still a “small number of people in the Hong Kong community” who do not properly understand the policy of “one country, two systems” – Explanations on the Draft Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (given at the Tenth Session of the Standing Committee of the Twelfth National People’s Congress on 27 August 2014).

<sup>12</sup> The process is described in the Basic Law, Art.73(9): “If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after a passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People’s Government for decision.”

<sup>13</sup> Basic Law, Art.54.

<sup>14</sup> Basic Law, Art.55(1). The principal officials are the Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit,

must be Chinese citizens who are permanent residents of the HKSAR with no right of abode in a foreign country.<sup>15</sup> They are capable of removal by the Chief Executive, and their term in office shall not extend beyond the expiry of the term of office of the Chief Executive who appointed them.<sup>16</sup> There is no prohibition on a subsequent Chief Executive reappointing existing or previous members of the Executive Council, however. At the time of writing, there were sixteen official<sup>17</sup> and sixteen non-official members of the Executive Council, excluding the Chief Executive.

It is clear that the Executive Council is subordinate to the Chief Executive. She is appointed by the Basic Law to preside over the Executive Council, and though she must consult the Council before making “important” policy decisions, introducing bills to the Legislative Council, making subordinate legislation or dissolving the Legislative Council,<sup>18</sup> she is not bound to follow their views or recommendations. If she does not accept a majority opinion of the Executive Council, she is merely required to “put the specific reasons on record”.<sup>19</sup> In any event, as individuals enjoy membership of the Executive Council at the pleasure of the Chief Executive, they are unlikely to be appointed if they are thought likely to be disloyal, and there is little incentive for them to express vigorous disagreement with her proposals. Nevertheless, the Chief Executive-in-Council is clearly a distinct legal entity from the Chief Executive and the terms should not be used synonymously. The Chief Executive is not required to consult the Executive Council on the appointment, removal and disciplining of officials and the adoption of measures in emergencies.<sup>20</sup> The Chief Executive, principal officials, members of the Executive Council, members of the Legislative Council and judges are required to swear to uphold the Basic Law and to swear allegiance to the HKSAR.<sup>21</sup>

The Chief Executive’s grip over central government expanded in 2002 with the introduction by then Chief Executive Tung Chee Hwa of the Principal

Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise. They are nominated by the Chief Executive and appointed by the Central People’s Government – Basic Law, Art.48(5).

<sup>15</sup> Basic Law, Art.55(2). For appointment as a principal official, a person must additionally have ordinarily resided in Hong Kong for a continuous period of not less than fifteen years – *id.*, Art.61.

<sup>16</sup> *Id.*, Art.55(1).

<sup>17</sup> Namely, the Chief Secretary for Administration, Financial Secretary, Secretary for Justice, Secretary for the Environment, Secretary for Innovation and Technology, Secretary for Home Affairs, Secretary for Financial Services and the Treasury, Secretary for Labour and Welfare, Secretary for the Civil Service, Secretary for Security, Secretary for Transport and Housing, Secretary for Food and Health, Secretary for Commerce and Economic Development, Secretary for Development, Secretary for Education, and Secretary for Constitutional and Mainland Affairs.

<sup>18</sup> Basic Law, Arts.50(2) and 56. <sup>19</sup> *Id.*, Art.56(3). <sup>20</sup> Basic Law, Art.56(2).

<sup>21</sup> *Id.*, Art.104; Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress (adopted by the Standing Committee of the Twelfth National People’s Congress at its Twenty-Fourth Session on 7 November 2016).



Officials Accountability System. This was marketed as increasing accountability, with principal officials no longer being high-ranking civil servants, but political appointees chosen by the Chief Executive for a fixed term not exceeding that of the Chief Executive by whom they were appointed. This consolidated the power of the Chief Executive by giving him more control over, and likely increased loyalty from, the principal officials. The Political Appointment System, introduced in 2008 under then Chief Executive Donald Tsang, expanded the previous system by adding two levels of political appointees below Secretaries of Departments, namely Under Secretaries and Political Assistants.<sup>22</sup>

### Civil Service

The civil service is administered by the Civil Service Bureau, headed by the Secretary for the Civil Service. The core frameworks under which the Bureau administers the civil service are the Public Service (Administration) Order, the Public Service (Disciplinary) Regulation and the Civil Service Regulations,<sup>23</sup> with additional provisions regulating specific sectors of the civil service. A number of reforms have been implemented, including on pay and conditions, conduct and discipline, performance management, and training and development. It is said that the civil service establishment reduced from around 198,000 persons in January 2000 to around 161,000 in March 2007 through “process re-engineering, procedure streamlining and organisational review”,<sup>24</sup> and that it currently employs approximately 156,000 people.<sup>25</sup>

The Chief Executive appoints and removes public officeholders “in accordance with legal procedures”.<sup>26</sup> Those serving in government departments must be permanent residents of the HKSAR,<sup>27</sup> although British and foreign nationals previously serving in the public service in Hong Kong, or those holding permanent identity cards in the HKSAR, may also serve as public servants in government departments. However, only Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country may serve as the Secretaries or Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration or Commissioner of Customs and Excise.<sup>28</sup> It is provided by the Basic Law that public servants “must be dedicated to their

<sup>22</sup> See further Albert H. Y. Chen, “The Controversial Appointment of Under Secretaries and Political Assistants in 2008” (2008) 38(2) *Hong Kong Law Journal* 325.

<sup>23</sup> There are also Civil Service Bureau Circulars and Circular Memoranda. The Public Service Commission is a statutory body advising the Chief Executive on civil service appointments, promotions and discipline – Public Service Commission Ordinance (cap.93).

<sup>24</sup> [www.csb.gov.hk/english/admin/csr/9.html](http://www.csb.gov.hk/english/admin/csr/9.html).

<sup>25</sup> [www.gov.hk/en/about/govdirectory/govstructure.htm](http://www.gov.hk/en/about/govdirectory/govstructure.htm).

<sup>26</sup> Basic Law, Art.48(7).

<sup>27</sup> *Id.*, Art.99(1). <sup>28</sup> *Id.*, Art.101(1).

duties and be responsible to the Government of the Hong Kong Special Administrative Region”.<sup>29</sup>

A Civil Service Code was issued by way of departmental circular in 2009. The Code provides that civil servants must uphold the core values of (i) commitment to the rule of law, (ii) honesty and integrity, (iii) objectivity and impartiality, (iv) political neutrality, (v) accountability for decisions and actions, and (vi) dedication, professionalism and diligence.<sup>30</sup> There is a complaint and redress mechanism for civil servants who feel that they have been directed to act in a way which is improper or in conflict with the core values of the Civil Service, in breach of any government regulations including the Civil Service Regulations and regulations governing the use of public money, would conflict with their role as civil servants, or may involve possible maladministration.<sup>31</sup> Procedures are set out in a departmental circular for civil servants who feel that they have been directed to act in a way that is unlawful.<sup>32</sup> There is a separate Code for Officials under the Political Appointment System.<sup>33</sup> Public servants are subject to official secrets restrictions.<sup>34</sup>

## Local Government

### District Councils

Hong Kong is divided into eighteen District Council areas.<sup>35</sup> The District Councils were established on 1 January 2000, replacing the provisional District Boards and the District Boards by which they were preceded. There are 458 members of District Councils, of whom 431 are elected<sup>36</sup> and 27 are *ex officio* (the Chairs of the Rural Committees).<sup>37</sup> The eligibility criteria for standing as a

<sup>29</sup> *Id.*, Art.99(2).

<sup>30</sup> Civil Service Code, p.2. The content of these core values is set out in the Code at pp.3–5.

<sup>31</sup> *Id.*, pp.11–13. <sup>32</sup> CSB Circular No.7/2012.

<sup>33</sup> Code for Officials under the Political Appointment System. This adopts (pp.6–7) the same core values as the Civil Service Code, with the exception that “objectivity and impartiality” in the Civil Service Code is replaced with “impartiality in the execution of public functions”. In addition, after “dedication, professionalism and diligence” are inserted the words “in serving the community”.

<sup>34</sup> Official Secrets Ordinance (cap.521).

<sup>35</sup> District Councils Ordinance (cap.547), ss.3–4 and Schs.1–2. There are four on Hong Kong Island (Central and Western District Council; Eastern District Council; Southern District Council; Wan Chai District Council), five in Kowloon (Kowloon City District Council; Kwun Tong District Council; Sham Shui Po District Council; Wong Tai Sin District Council; Yau Tsim Mong District Council), eight in the New Territories (Kwai Tsing District Council; North District Council; Sai Kung District Council; Sha Tin District Council; Tai Po District Council; Tsuen Wan District Council; Tuen Mun District Council; Yuen Long District Council), and one for the outlying islands (Islands District Council).

<sup>36</sup> District Councils Ordinance (cap.547), Sch.3, Part 1. <sup>37</sup> *Id.*, ss.9 and 17.