

Introduction and Overview 1

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Aims of the Book

For a society to function, there must be some system for the regulation of interactions between individuals in society. More primitive societies may have largely relied on customs and moral norms to regulate such interactions. Across much of the modern world today, law has taken on a fundamental role in governing human behaviour. While law is not, even in modern societies, the sole mechanism for regulating human conduct, the creation and maintenance of a functioning legal system has been of prime importance in providing for social stability and the well-being of humans in advanced societies. Indeed, the subjection of individuals and governments to law can be seen to be one of the major achievements of the human race.

For Hong Kong, the legal system established by the British during the period of colonisation is widely seen as one of the more positive legacies of British rule over the territory. With the return of sovereignty over Hong Kong to China on 1 July 1997, the common law legal tradition in Hong Kong is regarded as a major asset of the Special Administrative Region which is vital not only in preserving the freedoms and existing way of life of Hong Kong residents but also in placing Hong Kong on strong foundations as the city strives to preserve and enhance its regional and international

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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.¹ 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'.²

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.³ 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

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

² Ibid.

³ The process of legislation will be discussed in Chapter 6.

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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.⁴ The other main source of law is case law, namely the judicial decisions made by the courts.⁵ 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 China⁶ and is guaranteed to remain for at least fifty years.⁷ 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.⁸ This requires

⁴ The sources of law will be discussed in Chapter 4.

⁵ The courts and doctrine of precedent will be discussed in Chapter 5.

⁶ Basic Law, art. 8.

⁷ Basic Law, art. 5.

⁸ 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.⁹ 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.'¹⁰ 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'.¹¹ 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,¹² 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.¹³ 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.

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

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

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

¹² Basic Law, art. 35; see also Chapter 11.

¹³ See 'Justice' at the Old Bailey. Barnaby's Picture Library.

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- *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,¹⁴ and it is the legacy of his political theory that developed in the tumultuous political climate of revolutionary France.¹⁵ 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 3.

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 1701.¹⁶ 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

¹⁴ The doctrine of the separation of powers will be discussed in detail in Chapter 3.

¹⁵ M. Richter (ed.), *The Political Theory of Montesquieu* (M. Richter, trans.) (Cambridge: Cambridge University Press 1977).

¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰

Judicial independence is also protected by the Basic Law, which vests the power of final adjudication in the Court of Final Appeal,²¹ 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.²² This raises key questions about the legitimacy of claims to the effectual independence of the Hong Kong judiciary in practice.

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

¹⁸ Basic Law, art. 85.

¹⁹ Basic Law, art. 89.

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

²¹ Basic Law, art. 82.

²² 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

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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.²³ 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.²⁴ 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;²⁵ fiscal responsibilities (such as budgets²⁶ and taxation²⁷); enforcing the idea of responsible government (by asking questions about the work of the government,²⁸ debating matters of public interest,²⁹ keeping check on the policy initiatives of the Chief Executive³⁰ and being available to Hong Kong residents with complaints³¹); the

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

²³ Basic Law, Chapter IV.

²⁴ Basic Law, art. 66.

²⁵ Basic Law, art. 73(1).

²⁶ Basic Law, art. 73(2).

²⁷ Basic Law, art. 73(3).

²⁸ Basic Law, art. 73(5).

²⁹ Basic Law, art. 73(6).

³⁰ Basic Law, art. 73(4).

³¹ Basic Law, art. 73(8).

appointment and dismissal of members of the judiciary³² (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.³³ The detailed powers and functions of the Legislative Council are defined in the Legislative Council Ordinance³⁴ and the Legislative Council (Powers and Privileges) Ordinance.³⁵ The most significant restriction on the Legislative Council involves matters that may be the subject of legislation initiated by the legislature.³⁶ 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.³⁷

Judicial Institutions

The main institution engaged in the exercise of judicial power in Hong Kong is the courts. This is in accordance with the structure³⁸ outlined by the Basic Law which provides that the courts at all levels will be the judiciary of the region.³⁹ 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.⁴⁰ 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

³² Basic Law, art. 73(7).

³³ Basic Law, art. 73(9).

³⁴ Legislative Council Ordinance (Cap. 542).

³⁵ Legislative Council (Powers and Privileges) Ordinance (Cap. 382).

³⁶ 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.

³⁷ Basic Law, art. 62(5).

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

³⁹ Basic Law, art. 80.

⁴⁰ Basic Law, art. 82.

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Ordinance.⁴¹ 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.⁴² This includes the Department of Administration, Department of Finance, Department of Justice and various bureaux, divisions and commissions.⁴³ 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:⁴⁴

- 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 bureaux and departments. It is also responsible for representing the government in civil litigation and arbitrations.

⁴¹ Court of Final Appeal Ordinance (Cap. 484).

⁴² Basic Law, art. 59.

⁴³ Basic Law, art. 60.

⁴⁴ 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.