of these emigrants who, after their 'naturalization' in the host society, have returned to Hong Kong for work and business. Their status – whether deemed to be local or otherwise, as Hong Kong people overseas – has always been viewed as problematic and ambiguous, even for the public authorities in Hong Kong, China or Britain.

11. Reflecting its cosmopolitan character, Hong Kong has adopted English and Chinese as its two official languages. Such a linguistic dualism has been endorsed in the two 'benchmark' official documents enshrining the governance of Hong Kong after 1997. They are the Sino-British Joint Declaration of 1985 on the Future of Hong Kong and the Basic Law promulgated by the Chinese government as the mini constitution for the Hong Kong Special Administrative Region (SAR).

12. Before 1997 and its reintegration with China, Hong Kong as a highly internationalized city port was accustomed to the use of English as the principal language in both the public and private sectors. However, Chinese has now assumed parity with English as the standard medium of government now that Hong Kong has become an SAR of China, although English continues to be more popular in the field of business and commerce.

Besides English the Cantonese dialect has always been the most common spoken medium within the local (Chinese) community. However, Putonghua (Mandarin) has since the 1997 handover has become increasingly popular as the official spoken version of Chinese. In spite of the diversity between different spoken dialects, Chinese characters are common in their written form, thereby providing a unified means of communication in the use of Chinese.

Chapter 3. Political System

13. Prior to July 1997 Hong Kong was a British overseas dependent territory administered by the Hong Kong government headed by the Governor as the representative of the Queen of the United Kingdom reigning over Hong Kong. The Governor owed his authority to the Letters Patent which established the basic framework of the administration. This document, alongside the Royal Instructions, had the virtual effect of prescribing the constitution of Hong Kong during its pre-1997 colonial days. Hong Kong reverted back to China on 1 July 1997 and has since become an SAR of the People's Republic of China (PRC). In place of the Letters Patent and Royal Instructions, the Basic Law which China promulgated earlier came into effect simultaneously to become the constitutional instrument prescribing the (capitalist) socio-political system for Hong Kong.

14. The Basic Law prescribes a wide latitude of local self-governing autonomy for the Hong Kong SAR. However, the prerogative of dealing with its defence and foreign affairs belongs to the central government. The SAR is able to exercise executive, legislative and independent judicial power, including that of final adjudication. Its executive authorities and legislature are be composed of permanent residents of Hong Kong. The SAR is to continue as a free port, a separate customs territory and an international financial centre and may, on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with foreign states and regions, and international organizations in the appropriate fields, including economics, trade, the financial and monetary, shipping, communications, tourism, cultural and sports fields.

15. The Basic Law creates the office of the Chief Executive as the head of the Hong Kong SAR. He also heads the government of the Hong Kong SAR. In this capacity, he is responsible for implementing the Basic Law, signing bills (proposed legislation) and budgets passed by the Legislative Council, promulgating laws, making decisions on government policies and issuing executive orders. He is assisted by the Executive Council in policy-making. The Chief Executive is selected by election by a broadly representative local Election Committee appointed by the central government. The Chief Executive thus elected is appointed by the Central People's Congress in Beijing.

16. The Executive Council can be viewed as the *de facto* Cabinet for the Chief Executive in assisting him in policy-making. The Chief Executive in Council is the competent authority, for example, for introducing bills to the Legislative Council, making subsidiary legislation or dissolving the Legislative Council. This organ also determines appeals, petitions and objections under those ordinances which confer a statutory right of appeal. Members of the Executive Council are appointed by the Chief Executive and drawn from among the principal officials of the SAR government, Members of the Legislative Council and prominent personalities in the community.

By virtue of the Basic Law, the Legislative Council is the law-making assembly for the SAR. It is in this connection the competent authority to enact laws, approve

the Annual Budget, control public expenditure and monitor the performance of the government by putting forward questions on matters of public interest and summoning persons concerned to testify or give evidence. It is also vested with the prerogative to impeach the Chief Executive (if initiated jointly by one-fourth of its members), as well as to endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court. It has always been possible for the government and executive authority to introduce before the Legislative Council legislative and public funding proposals. However, members in the Council can move to propose independent legal enactment by way of presenting before the Council Private Members Bills. Nevertheless, pursuance of such an initiative requires the prior consent of the Chief Executive.

17. Other than enacting legislation, the Parliament-equivalent Council holds two major debates every year when it is in session: one which is comprehensive in coverage dealing with the entire platform of government policies which follows the Chief Executive's annual policy address; and the other is the budget debate on financial and economic affairs in the SAR as a sequel to the annual budget presented by the Financial Secretary in March and which he moves before the Legislative Council as the Appropriation Bill.

18. While in session, members of the Council may question the government on the rationale, implications and problems relating to public policy issues and official decisions. They either seek information on such issues or ask for official explanations and actions on them. Members may in this process request either oral or written answers to the questions, and may put forward supplementary questions for the purpose of elucidating an answer already given. However, since 1997 it has been more a common practice for the SAR legislature to summon the responsible government official or private person to appear before the Council to provide oral explanations and give evidence, if necessary, on matters of concern to public interest.

19. The Council normally meets in public every Wednesday. Following the pre-1997 practice, the Chief Executive occasionally addresses or answers questions from its members at a special meeting. The post-1997 Legislative Council appears to be able to sustain the transparency of its sessions previously maintained by its predecessor, inasmuch as all Legislative Council sittings and most meetings of its bill committees, subcommittees and panels are open to the public.

§1. Composition of the Legislative Council and Legislative Process

20. The law-enacting organ, the Legislative Council, elects its President from among its members. Altogether there are 70 members constituting the Council, comprising 35 members returned by geographical constituencies through direct elections and the other half of the membership returned by functional constituencies. The functional constituencies were designated by the pre-1997 government essentially by virtue of occupational criteria to articulate the specific interest of a given economic, social or professional group. Previously, unofficial members were

appointed by the Governor under British rule but under the 1995 electoral arrangement, all appointed unofficial seats were rescinded, as sanctioned under the Sino-British Joint Declaration. However, in addition to the 21 functional constituencies which already existed 9 new functional constituencies basically reflecting the occupational and workplace (in addition to the residential) affiliation of the members were created, so that the entire working population was enfranchised with a second 'ticket' enabling them to vote to return a candidate from each of these nine industrial groupings of (a) primary production, power and construction; (b) textiles and garments; (c) manufacturing; (d) import and export; (e) wholesale and retail; (f) hotels and catering; (g) transport and communications; (h) financing, insurance, real estate and business services; and (i) community, social and personal services. Five new constitutencies were each added to both of these two franchise categories in the fifth term of the Legislative Council for the period between 1 October 2008 and 30 September 2012.

21. The post-1997 SAR legislature has inherited its pattern of composition from that of the colonial government at the eve of the transfer of sovereignty. However, those members returned by geographical constituencies are no longer a hybrid mix of those elected directly and those elected indirectly by an election committee comprising all elected district board members at the 'local government' level. Instead, all of the 30 members in the division of 'geographical constituencies' were directly elected. This number is now raised to 35. At present, the SAR legislature is in its sixth term of office, from 2012 to 2016. The term of office of these Legislative Council members is hence four years, as prescribed by the Basic Law and the Legislative Council Ordinance. The composition of the Council has been evolved from its first term through the changes to its present formula of composition shown in Table 1.

Table 1 Composition of the Hong Kong Legislative Council

Membership	*First term (1998–2000)*	*Second term (2000–2004)*	*Third term (2004–2008)*	*Fourth term (2008–2012)*	*Fifth term (2012–2016)*
(a) elected by geographical constituencies through direct elections	20	24	30	30	35
(b) elected by functional constituencies	30	30	30	30	35
(c) elected by an election committee	10	6	–	–	–
Total	60	60	60	60	70

22. Geographical constituency elections are held on the basis of universal suffrage. For the fifth term of the Legislative Council, the Hong Kong SAR is divided into five geographical constituencies, each having five to nine seats. The list voting system operating under the largest remainder formula, which is a form of proportional representation voting system, is adopted. Under this system, candidates contest the election in the form of lists. Each list may consist of any number of candidates up to the number of seats in the relevant constituency. An elector is entitled to cast one vote for a list in the constituency in which he is registered. The seats for the constituency are distributed among the lists according to the number of votes obtained by the respective lists.

Any permanent resident of the Hong Kong SAR who is a Chinese citizen with no right of abode in any foreign country may stand for election in any geographical constituency, provided that he or she is a registered elector on the Final Register, has attained the age of 21, and has ordinarily resided in Hong Kong for the preceding three years.

23. For the fifth term of the Legislative Council, the functional constituencies listed are: (a) Heung Yee Kuk; (b) agriculture and fisheries; (c) insurance; (d) transport; (e) education; (f) legal; (g) accountancy; (h) medical; (i) health services; (j) engineering; (k) architectural, surveying and planning; (l) labour; (m) social welfare; (n) real estate and construction; (o) tourism; (p) commercial (first); (q) commercial (second); (r) industrial (first); (s) industrial (second); (t) finance; (u) financial services; (v) sports, performing arts, culture and publication; (w) import and export; (x) textiles and garment; (y) wholesale and retail; (z) information technology; (aa) catering; and (bb) District Council (first); (cc) District Council (second) and (dd) textiles and garments. The labour functional constituency returns three Legislative Council members, the District Council (second) constituency is provided with four seats, while the other 27 functional constituencies return one member each.

Functional constituencies which represent professional groups have electorates based on membership of professions with well-established and recognized qualifications, including statutory qualifications. Each individual member has one vote. The electorates of functional constituencies representing economic or social groups are generally made up of the business and employment units as well as corporate members of major organizations representative of the relevant sectors. Each corporate member appoints an authorized representative to cast the vote on its behalf in an election.

24. The legislative process in the Hong Kong SAR is still in large measure analogous with the parliamentary procedures in the United Kingdom. The first reading of the bill is moved in most instances by the government and is by and large ceremonial, entailing 'nothing more than the formal citation of the title of the bill', and is often introduced by with a brief official speech explaining the intent and main coverage of the bill. The second reading debate is usually resumed in the next or the next but one session. If there are no substantial objections or problems the bill will be immediately referred to the committee stage. Otherwise, the bill will be debated at this second reading session. If the debate turns out to be controversial,

the second reading session may be adjourned to allow consideration for amendments.

25. The committee stage that follows the second is normally convened in committee of the whole Council. The Secretary for Justice, heading the Legal Department, proposed various amendments so as to streamline the proposed draft legislation as well as to incorporate amendments stemming from the debate. The Secretary for Justice then reports to the Council that the committee stage has been completed and recommends the third reading of the bill, normally as a procedural ritual. After the proceedings in the law-making assembly, the Chief Executive signifies his assent, which is announced next in the government gazette. By virtue of the Chief Executive's assent, a bill becomes an ordinance without being subject to approval from the central government.

26. The SAR Legislative Council emulates by and large its pre-1997 predecessor in structure and carries under its auspices a number of standing committees. These include:

- the Finance Committee which scrutinizes public expenditure, assisted by two sub-committees, the Public Works sub-Committee and the Establishment Sub-Committee;
- the House Committee;
- the Public Accounts Committee;
- the Committee on Members' Interests; and
- the Committee on Rules of Procedure.

27. The Finance Committee examines public expenditure, both at special meetings held in March to screen the budgetary draft estimates prepared by the Financial Secretary for the subsequent year as well as at regular meetings, between October and July, to consider proposals for supplementary provisions of funds for public expenditure outside the budget. These meetings are held in public. Under the umbrella of the Finance Committee, the Establishment Subcommittee examines and makes recommendations to the Finance Committee on the government's proposals for the creation, redeployment and deletion of directorate posts, and for changes to the structure of grades and ranks in the civil service. In parallel, the Public Works Sub-Committee examines and makes recommendations to the Finance Committee on the government's expenditure proposals under the Capital Works Reserve Fund for projects in the Public Works Programme and building projects carried out by or on behalf of subvented organizations.

28. The House Committee, whose sitting excludes the President of the Legislative Council, performs the in-house role of coordinating within a coherent framework of an overall integrated agenda all business of the Council and of its committees, including reports on subsidiary legislation tabled in the Council; questions that members intended to put to the government; motions and bills to be debated; and any other matters of public concern.

The House Committee may constitute under its auspices a bills committee to consider the principles and general merits of a bill submitted to it for scrutiny. A bills committee hence constituted may also consider the detailed provisions and amendments relevant to the bill. It usually tables a report before the Council and is dissolved on the passage of the bill or when the House Committee so decides. Besides, the House Committee may also appoint subcommittees to consider items of existing subsidiary legislation tabled in Council. Like the bills committees, these subcommittees on subsidiary legislation also become defunct upon the enactment of the subsidiary legislative item.

29. The Public Accounts Committee plays the role of ensuring that public expenditure has not been incurred for purposes other than those for which these funds have been designated and that the spending has been cost-effective and free from defaults and malpractices. In this connection, the Director of Audit submits two reports to the Legislative Council each year: one relating to value-for-money audits (in April) and the other pertaining to the audit of the government's annual statements of accounts (in November).

30. The Committee on Members' Interests investigates the arrangements for the compilation, maintenance and accessibility of the Register of Members' Interests. Its purview also includes matters pertaining to the declaration of interests by Council members as well as their ethics of conduct, and providing guidelines on and making recommendations thereof relating to their interests in the capacity as representatives in the law-making assembly.

31. The Committee on Rules of Procedure is responsible for reviewing the Rules of Procedure of the Legislative Council and its committees, and proposing to the Council henceforth such amendments of changes as are deemed necessary.

32. In a fashion almost reminiscent of the committee system of the American Congress in the United States, the Legislative Council has created a constellation of 18 panels to examine the government's policies and each specializes in a specific policy area of public administration. The functional areas which these panels cater to include (a) administration of justice and legal services; (b) constitutional affairs; (c) economic services; (d) education; (e) environmental affairs; (f) financial affairs; (g) health services; (h) home affairs; (i) housing; (j) information policy; (k) planning, lands and works; (l) manpower; (m) public service; (n) recreation and culture; (o) security; (p) trade and industry; (q) transport; and (r) welfare services. These panels may in turn each appoint their own sub-committees.

33. The Legislative Council may appoint, on an *ad hoc* basis, Select Committees to consider and deliberate any specific matters or bills. These Select Committees are to report back to the Council which may debate on the report of findings by the Committees.

34. Besides, the Council may set up an investigation committee under Rule 49B (2A) of the Rules of Procedure to enable the council to probe a motion of censure

against a Council member for misconduct and to make recommendations on the motion as to whether to disqualify the member concerned.

35. The Legislative Council is vested with its own administrative autonomy under the auspices of a Council Commission. The Commission's main function is to provide support and services for the Legislative Council through the Council's Secretariat. The Commission has the authority to employ staff of the Secretariat and oversee its work, to determine the organization and administration of support services and facilities, and to formulate policies for the effective performance of the Secretariat in support of the Legislative Council.

36. The Legislative Council also furnishes the public with a grievance redress mechanism *vis-à-vis* any legislation, government policies and actions adverse to their interest. The Council members work by a roster of weekly duties to receive complaints and representations. Apart from this, they attend 'ward duty' at the Public Complaints Office to meet and offer advice to complaints from the public.

§2. Legal and Judical System

37. The legal system of the Hong Kong SAR has retained its hitherto pre-1997 character which has evolved essentially from the heritage of the British system. However, because of the change of sovereignty, the apex arrangement of the judicial structure needed to be reconstituted. Under the pre-1997 system, appeals from the decisions of the highest court (Court of Appeal) in the territory were heard in the Judicial Committee of the Privy Council in London. However, as Hong Kong becomes reintegrated with China as its SAR, the power of final judgment now resides locally, in the Court of Final Appeal. Appeal cases are no longer actionable in the British jurisdiction. Otherwise, the entire judicial system has remained intact as it was before 1997, with the High Court in the first tier, followed at the next level by the district court, coupled by a spectrum of specialized courts in parallel, including the labour tribunal, the small claims tribunal, the obscene articles tribunal, the coroner's court and the lands tribunal (which are equivalent to the district court), and the magistracy and juvenile court at the lowest tier.

38. By virtue of the Sino-British Joint Declaration and the Basic Law, the English fashioned common law and rules of equity have continued to be in force in Hong Kong, governing the conduct of judicial proceedings and decisions.

39. The Court of Final Appeal is at the apex of the judicial system, headed by the Chief Justice. The Court is to be constituted of five judges in its sitting. They can be drawn from a pool of three permanent judges, a panel of five non-permanent local judges and ten non-permanent judges sourced from other common law jurisdictions. The Chief Justice is assisted by the Judiciary Administrator in the administration of the judiciary.

40. Below the Court of Final Appeal is the High Court, comprising the Court of Appeal and Court of First Instance. Staffing the High Court are the Chief Judge of the High Court, 10 Justices of Appeal and 32 Judges of the Court of First Instance. The Court of Appeal hears all appeals from the decision of the Court of First Instance and the District Court. The Court of First Instance has unlimited jurisdiction on all civil and criminal cases.

41. At one tier lower is the District Court, staffed by the Chief District Judge, together with one Principal Family Court Judge and 34 judges. The District Court has prerogative of decision on criminal cases but subject to a maximum power of giving sentence of seven years' imprisonment. It can hear civil claims up to a ceiling of one million dollars, as well as cases of employee compensation, equal opportunity breaches and matrimonial disputes and stamp duty appeals.

42. At the bottom tier is the magistracy, staffed by the Chief Magistrate, 4 principal magistrates and 59 permanent magistrates and 10 special magistrates, who are able to hear only criminal cases. The ceiling of their sentencing power is two years' imprisonment and a fine of a hundred thousand dollars.

§3. Local Government

43. Before 1982 the structure of the local government emanating from the various piecemeal reform measures preceding the 1981 White Paper on District Administration (which documents a wholesome blueprint of local administrative reforms in a domain which has virtually been left in a vacuum state prior to the 1970s and 1980s) has been a hybrid pattern which was fragmented and cumbersome, involving an array of overlapping institutions like the City District Office, City District Committee, the Urban Council, the District Management Committee, the Area Committee, the New Territories Administration and the Heung Yee Kuk as the rural consultative council in the New Territories.

44. The benchmark institutional arrangement laid down under the 1981 White Paper to consolidate the above pluralistic organs was hence a harmonized two-tier local government structure comprising the district boards and district management committees, created in each of the 18 local administrative districts in 1982. Concomitantly, the District Boards Ordinance has made the district boards statutory bodies, since April 1982 in the New Territories and October 1982 in the urban areas, to perform the representative role of a local assembly for public consultation and participation in the administration of the districts. The district board system has been inherited almost entirely by the SAR government after 1997. However, following the 1998 review of the structure and functions of district organizations, the system has been endorsed and enhanced, as indicative in the re-labelling of the district boards as district councils.

The district council's agenda is hence to advise the government on a wide range of matters affecting the interests or well-being of the people living and working in the district. In this capacity, each district council operates a 'meet-the-public'

scheme under which residents in the district may meet board members, as representatives of their local constituency, to articulate their views and grievances concerning the governance of their district. Reciprocally, the scheme also enables the Council members to collect public views on local matters and region-wide issues, to be ploughed back to the government to help improve the provision and quality of various public services. Besides, the Councils carry out minor works projects and community involvement schemes.

The bulk of the District Council members are elected on the basis of 18 local constituencies, totalling 412 who are serving a four-year term commencing January 2012. In addition, there is still a segment of 68 appointed members, alongside a fraction of 27 *ex officio* members (by virtue of their incumbency as chairmen of the rural committees in the New Territories).

45. Concordant to the council in each district, there is a district management committee presided over *ex officio* by the District Officer and on which the key departments providing essential services in the district are also represented. This official committee liaises closely with the district council on the administration of public services at the local municipal level, not only to coordinate the provision of these services but also to ensure that the district's needs are effectively met. It also enables the departments represented to consult, co-ordinate and collaborate with each other to optimize the value of their services provided to the public.

46. Still constituting part of the local government machinery is a fringe of ancillary consultative organs, notably the area committees and mutual aid committees. The latter are building-based resident organizations, established to improve the security, cleanliness and general management of multi-storey buildings. On the other hand, the area committees have been, since November 1994, rationalized to assume a more refined and specific role to (a) assist in the organization of community activities and government campaigns; (b) advise on issues of a localized nature in the area; and (c) encourage residents' participation in district affairs. There are at present 63 area committees.

47. The executive arm of the local government is part of the civil service, which is the district office, headed by the District Officer and belonging to the Home Affairs Department. The geographical jurisdiction of the district office corresponds to that of the district council (of which there are altogether nine in the urban sector of the territory and another nine in the New Territories, making up altogether 18 districts). The district offices serve as the government's focal points of liaison with the grassroots populace, both the local communities and their voluntary organizations. They have been, in particular, instrumental in explaining government policies and ameliorating misunderstandings and conflicts between the government and ordinary citizens and their households. Parallel to the District Office is a series of district-specific regional offices operated by those government departments whose nature of work has made it imperative for them to devolve their services to the locality – including, notably, the Police, the Social Welfare Department, the Labour Department, the Food and Environmental Hygiene Department and the Leisure and Cultural Services Department, etc.

48. The revamped structure of representative government in Hong Kong since the series of electoral reforms in 1980 which crystallized on the eve of the 1997 dateline of political handover is a three-tier system in its governance framework. Intervening between the central government-cum-legislative and executive councils on top and the district administration at the locality is an intermediate level of regional jurisdiction, with power more or less analogous to a municipal authority's. The arrangement is, however, dualistic, because the urban sector (namely, including Hong Kong Island and Kowloon Peninsula) has been always covered, since the pre-war years, by the Urban Council and its executive adjunct, the Urban Services Department; yet the New Territories 'domain' was not configurated in an analogous fashion until the creation of the Regional Council, in April 1986, as the statutory municipal authority for the New Territories. It is supported, as in the parallel case of the Urban Council, by the Regional Services Department of the civil service.

49. However, such a three-tier system in representative government was considered to be too cumbersome by the post-1997 SAR government. The view was, as articulated in the findings of the Review of District Organizations conducted in June–July 1998, that there were a proliferation of representative assemblies and that the two Councils at the municipal level were duplicating the roles of the district councils and hence could be deemed redundant and be abolished. As a sequel to the Provision of Municipal Services (Reorganization) Ordinance enacted at the end of 1999, the Provisional Urban Council and the Provisional Regional Council were dissolved. In their place, the SAR government erected a new structure for the delivery of municipal services in January 2000, as the jurisdiction of the two defunct municipal councils was transferred to the administration and other newly created statutory bodies.

50. The above exercise of structural rationalization led to the inception of two new government departments, namely, (a) the Food and Environmental Hygiene Department which monitors, regulate and maintains standards in the areas of food safety and environmental hygiene; and (b) the Leisure and Culture Services Department (within the domain of the Home Affairs Bureau) for the provision of leisure and cultural services, management of cultural facilities and the provision of arts and culture, sport and recreation.

In addition, a Liquor Licensing Board was created to assume the former functions of the two municipal councils in considering applications for and granting of liquor licences. Concomitantly, a Licensing Appeals Board was appointed at an upper tier to hear appeals against decisions on licensing of food and environmental hygiene as well as leisure matters. At the same time, the membership of the Sports Development Board and the Arts Development Council was enhanced. And a high-level advisory body, the Culture and Heritage Commission was established in April 2000 to advise the government on the policies and funding priorities for arts and culture, with a view to the provision of more focused strategic planning and better coordination in the funding and delivery of arts and cultural activities.

§4. The Electoral System under Representative Government Reforms and Development

51. The electoral system has been advanced and revamped several times in the process of its evolution since the beginning of representative government reforms in the early 1980s. In place of the pre-1982 territory-wide and monistic constituency that primarily served the Urban Council election, a geographical network of 18 district-specific constituencies has been instituted, and later inherited by the post-1997 SAR government. Each of these 18 geographical constituencies had the dualistic mandate, before 2000, of returning its deputies on the district board and the Urban Council/ Regional Council. The latter function, of course, has been rescinded following the dissolution of the two municipal councils in 2000.

The notion and demarcation of the geographical constituencies have been, however, compounded further by the electoral arrangement for direct election to the Legislative Council introduced since the mid-1990s. Prior to 1997, there were, in parallel to the 'district board' constituencies, nine geographical constituencies demarcated for the territory returning 20 directly elected members in the Legislative Council in the 1995 election. However, the boundaries and number of these geographical constituencies were substantially revised for the direct elections held after 1997 for administration. As a sequel, there are now consolidated for the entire territory altogether five geographical constituencies each returning five to nine directly elected members to the SAR Legislative Council.

52. A concordant structure of 'functional constituency' and the institution of an election committee vested with the role of indirect election to the Legislative Council add greater complexity to the electoral system.

Each functional constituency represents an economic, social, or professional/ occupational sector which is substantial and important to the Hong Kong SAR. These functional constituencies, almost analogous to the designation of occupationally denominated deputies in the law-making assembly, have been listed above.

53. Direct election to the legislature is based upon universal suffrage which has been instituted here since the electoral reforms commenced in the 1980s. It is defined to include now everyone who is a Hong Kong permanent resident or has ordinarily resided in Hong Kong for the preceding seven years. The age floor for enrolling in the franchise was formerly stipulated at 21, but is has now been lowered to 18. In the year 2012, of those who were enfranchised under the above criterion, a total of 3.47 million had registered themselves as electors with the official register.

The electoral franchise for the functional constituencies is, as the label implies, functionally or occupationally differentiated. The electorates for those constituencies representing the professional/occupational groups are based upon membership of profession with well-established and recognized qualifications, including statutory qualifications. Concomitantly, the electorates of functional constituencies representing economic or social groups are generally made up of corporate members

of major organizations representative of the relevant sectors. Each corporate member appoints an authorized representative to cast the vote on its behalf in an election. For the fifth term of the Legislative Council (2012-2016), 35 members were returned by direct election based upon the geographical constituencies and an equal number of 35 was elected by the functional constituencies. The earlier practice of indirect election by an election committee was rescinded.

54. The policing of electoral activities in the territory belongs to the jurisdiction of an independent yet officially appointed agency called the Boundary and Election Commission created by virtue of the 1993 Boundary and Election Commission Ordinance. The Commission, now retitled as the Electoral Affairs Commission, is vested with the statutory authority to review the geographical constituency boundaries for the Legislative Council as well as the district council elections. It also advises the Chief Executive on instituting regulations on practical arrangements for the various elections and handle complaints pertaining to their conduct. The Commission, comprising three members headed by the High Court judge, is now also the competent agency for overseeing the conduct of elections, scrutinizing the procedures for these elections and arrangements to register the electors. In other words, it serves as the principal supervisory organ for prescribing the 'rules of the game' for the range of electoral activities and exercises in Hong Kong. It has, *inter alia*, redrawn the geographical boundaries for the relevant constituencies pertaining to the respective elections for the Legislative Council ; introduced a set of subsidiary legislation for voter registration and electoral procedures and published a code of guidelines to help regularize a variety of election-related activities.

55. A complementary agency specializing in the role of registering eligible voters in the franchise is now the Registration and Electoral Office which is also the secretariat and executive arm serving the Election Affairs Commission, responsible for implementing and administering the decisions of the Commission.

§5. The Consultative System of Advisory Boards and Committees

56. In addition to the two-tier popularly elected assemblies now enshrined as a result of the political and electoral reforms, it has been a celebrated tradition, as inherited from the pre-1997 government and the British colonial legacies, for the incumbent SAR administration to consult the relevant interested groups and professional/technocratic specialists on various aspects of public policy formulation and implementation through an extensive and informed network of advisory boards and committees. These advisory organs, either statutory or non-statutory, are instrumental in giving pertinent advice on various socio-political and technical issues to the government secretariat at the central level or specifically, to the head of a government department. Statutory bodies like the Hospital Authority are enpowered to exercise their legal prerogative in performing their functions within their purview of jurisdiction.

57. Membership of these advisory boards and committees includes both *ex officio* as well as unofficial incumbents who can, in turn, be either elected or appointed. In the case of the Labour Advisory Board, for instance, it has been the practice since its reforms in the 1980s for almost all workers' representatives to be selected by way of election among and by the registered trade unions in Hong Kong, while their employer counterparts are, on the other hand, nominated by the major trade, industrial and employer organizations in the territory.

58. At present, it has been estimated that as many as 5,100 members of the public are sitting on a total of about 460 such advisory committees and consultative bodies. Where these boards/agencies appear to proliferate, it has always been the intent and policy of the government to scale down their number in order to streamline and rationalize the structure of these adjunct bodies.

§6. The Civil Service: The Executive Functionary

59. The executive division of the Hong Kong SAR government is organized, in emulation of its pre-1997 predecessor, into both policy bureaux and departments. The policy bureaux, more or less equivalent to ministries, collectively form the government secretariat acting, in an implicit sense, like the cabinet of the Chief Executive at the central level of the government. There are currently twelve policy bureaux, each headed by a Secretary (also known as Director) of Bureau. At the apex of the administration, below the Chief Executive are the Chief Secretary for Administration, the Financial Secretary and the Secretary for Justice. The incumbents in these offices are politically appointed principal officials who are directly responsible to the Chief Executive and accountable to him for matters within the scope of their portfolios. They are also *ex officio* members of the Executive Council.

The Chief Secretary for Administration is the leading principal official of the SAR government and heads the government secretariat. She assists the Chief Executive in supervising the policy bureaux and performs a key role in coordinating their functions and activities (especially where the boundaries of their jurisdiction overlap) and ensuring harmonized decisions in policy formulation and implementation of the SAR government. The Chief Secretary's portfolio also covers specific priority areas of the Chief Executive's policy agenda, and is responsible for forging a closer and more effective working relationship between the executive arm of the government and the Legislative Council, as well as for drawing up the government's legislative programme. She also deputizes in this capacity for the Chief Executive in his absence.

The Financial Secretary oversees policy formulation and implementation in the domain of financial, monetary, economic, trade and employment matters. He chairs the Exchange Fund Advisory Committee, and the Economic and Employment Council. The Financial Secretary is hence responsible for the fiscal and economic policies of government. He is, in performing this role, the official who presents before the Legislative Council each year the public budget, which details the government's annual estimates of revenue and expenditure for the next financial year

sectors on a two-year trial basis. However, due to the lukewarm attitude of the employers towards this campaign and persistent canvassing by the labour unions, the government eventually succeeded in wresting consent from the employers' associations and was able to promulgate a statutory minimum wage law in 2011.

Chapter 5. The Suspension of the Individual Labour Contract

§1. Introduction

359. The performance of the individual contract of employment may be suspended when both or either party to the contract cannot perform their respective obligations and pursue their duties temporarily. Such suspension from work can be due to factors independent of their will and competence to work, as the employee may be physically handicapped or incapacitated because of sickness, accident, maternity confinement or other forms of incapacity. Likewise, it may be impossible for the employer to provide work because of a business ebb or shortage of raw materials and produces goods – or even breakdown of office equipment, machines or the plant. Besides, it is also permissible for the employer to institute suspension actions on disciplinary grounds.

360. In Hong Kong, the employee is entitled to a variety of protection and rights in conserving his income and employment security in spite of and in the event of such suspension, or involuntary work pause. Of course, these provisions vary according to the nature of the issues, each of which will be briefly considered as follows.

§2. Work Accidents and Occupational Diseases

361. The Employee's Compensation Ordinance is the competent piece of legislation in Hong Kong governing employers' obligations in the event of accidents at work resulting in injuries, or certain specified occupational diseases afflicting the employee. This statue, renamed from the former Workmen's Compensation Ordinance first enacted in 1953, is largely adapted after a draft Workmen's Compensation (East and West Africa) Model Ordinance circulated to all British overseas dependent territories by the British Colonial Office in 1937.[17]

I. Application of the Employees' Compensation Ordinance

362. As a sequel to its 1980 amendment and extended scope, the law protects virtually all waged and salaried workers manual as well as non-manual, under the preview of the Ordinance. However, there remain specified categories in the workforce who do not fall under its jurisdiction. These include, *inter alia*, outworkers; members of the employer's family who also abide in his residence; as well as casual or intermittent workers (unless they are employed for the purposes of the employer's trade or business, or for the purposes of any game or recreation – provided that

17. The Model Ordinance emulated, in essence, the UK Workmen's Compensation Acts of 1897, 1906 and 1925. However, such a principle was abolished and superseded in 1946 in Britain by the National Insurance (Industrial Injuries) Act, itself inspired by Lord Beveridge. Hong Kong has adopted and continues to practise hence what is basically now a pre-Beveridge system.

they are engaged or paid through a club). Unlike the jurisdiction of most other important labour law, civil service employees are also covered by this Ordinance for their protection against industrial injuries and occupational diseases.

II. Employers' Liability under the Employees' Compensation Ordinance

363. Basically, the legal liability incumbent upon the employer as a sequel to an injury which his employee sustains in the course of and arising out of employment is two-fold. The first is his responsibility to pay compensation to the injured employee and the second is his duty to notify the Commissioner for Labour of the accident. In discharge of the latter obligation, the employer is legally required to inform the Labour Department, in the prescribed form, of any accident within seven days after it happens or is known to him. Should the accident be of a nature serious enough to cause the incapacity of the employee for more than three days, he is, in parallel, liable to compensate the injured employee for his incapacity and loss of wages and hence earning ability. However, he is absolved from such liability of compensation where:

(i) the injury is self inflicted;
(ii) the injury is caused by the employee's addiction to drugs or alcohol, resulting in serious and permanent incapacity; and
(iii) the injury is similar to any injury from where the employee has falsely represented to his employer that he was previously free.

III. Categories of Employee Compensation

364. There are two important notions in Hong Kong crucial in determining such injury compensation to the employee. The first is:

(i) that of making periodical payment, in a manner analogous to the regular payment of normal wages and salaries earned, to the injured employee in supporting him during his temporary incapacity and absence from work during the sick leave period; while the second is
(ii) that of paying a lump-sum in compensation payable to the injured employee himself in the event of permanent incapacity, either total or partial, in respect of the equivalent loss of his earning ability, or to the dependants of the deceased where the industrial accident/occupational disease has resulted in death.

365. Periodical payment, to be disbursed on the normal pay days, are at the rate of two-thirds of the difference between the injured employee's normal monthly earnings (i.e. those prior to the accident) and his monthly earnings after the accident (which would be literally 'nil' in the period of sick leave while recovering from his incapacity which is temporary).

366. On the other hand, compensation for permanent incapacity represents an indemnity payable to the injured person who is hence handicapped for the remaining part of his working life. For this reason, the amount awarded as compensation has to be mitigated by age. The same logic applies to the case of industrial injury resulting in death.

367. Before 1980, compensation for permanent total incapacity used to be fixed at the level equivalent to 48 months' earnings. Legislative amendments to the Ordinance, however, not only liberalized this ceiling of 48 months' earnings but also transformed this number into a variable geared to the following age grades:

Under 40 years	96 months' earnings
Over 40 years but under 56 years	72 months' earnings
Over 56 years	48 months' earnings

368. Correspondingly, compensation for partial permanent incapacity is normally payable in proportion to the relative degree of percentage loss of the injured employee's earning capacity attributable to the accident, as determined by a medical board according to the First Schedule to the Ordinance.

369. The age-specific formula of a sliding scale is applicable as well to fatal accidents, where the amount payable to the deceased's dependants also varies accordingly:

Under 40 years	84 months' earnings
Over 40 years but under 56 years	60 months' earnings
Over 56 years	36 months' earnings

370. Such an employer's obligation to pay the lump-sum indemnity is on top of any periodical payments that have been disbursed to the injured person's temporary incapacity. However, the employer may stop or reduce proportionately the periodical payments otherwise payable to an injured person who chooses, of his own free will, to return to work before the expiry of the sick leave period as medically recommended.

371. The Employees' Compensation Ordinance was amended and extended in 1994 to cover cases where the employee sustains injury from an accident encountered on his way to or from work in the event of inhospitable weather (specifically, as when a typhoon signal no. 8 or above, or a red or black rainstorm warning signal is issued).

IV. Procedures

372. Claims for employees' compensation in respect of injuries sustained by the employee as a result of accidents arising from and in the course of his employment are effective only within a 24-month period after the accident. Where a prima facie case exists, the Commissioner for Labour and his authorized officers may make a claim for compensation on behalf of the injured employee (or his dependants, in the case of fatal accidents).

Where an injury gives rise to a claim to employees' compensation, the injured employee and his employer may agree upon the settlement of the claim in writing to the extent that the agreed level is not less than that payable under the legislation. It is not permissible for the parties to contract out, either by reduction or relinquishment, of their statutory rights and obligations in anticipation of any accidents.[18] Within 21 days after its approval, the employer has to effect payment or becomes liable to a surcharge for delayed payment.

373. To provide the injured employee with a 'fall-back' of financial support in the event of the employer's or the insurer's defaults in discharging payment either of employee compensation or common law damages, the parallel legislation, the Employees' Compensation Assistance Ordinance, enables the employee to apply for a 'make-up' payment from a centrally administered official agency, the Employees' Compensation Assistance Fund which the Ordinance creates. The Fund is financed by a levy imposed on the premium of every employee compensation insurance policy issued by an insurer as from 1 July 1990 onwards.

374. Where the compensation case is contested by the parties (in particular, by the insurer) without reaching an agreement, the dispute has to be adjudicated by judicial proceedings at court. The court, moreover, is the competent authority with the jurisdiction to:

(i) determine the amount of compensation to be paid and its manner of allocation, as in fatal accidents, where the deceased employee leaves only dependants who are partially and not wholly dependent upon his earnings;
(ii) determine the sum, either by periodical payments or lump sum, payable by the employer to meet the costs of providing constant attention where this is necessary in order to enable an injured employee to perform the essential activities of life. Constant care payment is in addition to the compensation that accrues to the employee or his dependants; and
(iii) review the level of periodical payments upon application from either of the parties.

18. Although this may be acceptable under specified restrictive circumstances and given the authorization by the Commissioner for Labour where, for instance, an aged or physically handicapped workman is considered specially liable to meet with an accident or if a workman who wishes to be employed in any specified trade, industry or process is diagnosed as suffering from or possesses records of pneumoconiosis problems.

V. Vicarious Liability of the Principals

375. In industries and trades where contracting and subcontracting exist, such as in building and construction, the principal may be held liable to pay compensation to an employee engaged by his lower-tier contractor or subcontractor who sustains injury from an accident in the course and arising out of the execution of work undertaken by the principal. The principal is also required to give due notice of any such claim to the direct employer of the workman (i.e. his contractor or subcontractor) and in so doing, is entitled to recover the relevant indemnification from the latter. However, this does not preclude the injured employee from seeking and obtaining compensation from his direct employer rather than the principal.

VI. Medical Expenses, Prostheses and Surgical Appliances

376. An employer is obliged to meet the medical expenses and the cost of supplying, fitting and servicing within a ten-year period any relevant prosthesis and surgical appliance that is needed by an employee who has sustained an injury during and because of his work. The expenses of the prosthesis or surgical aids, subject to stipulated maxima for the initial outlay and subsequent repair or renewal, are payable by the employer upon due certification by a Medical Assessment Board.

377. Medical expenses are payable only within 24 months after the accident that gives rise to the injury, and are not otherwise payable if the employer has provided free and adequate medical treatment to the employee.

VII. Occupational Diseases

378. Where an employee contracts certain types of occupational diseases as listed in the schedule to the Employees' Compensate Ordinance, he is also entitled to the law's protection in the event of incapacity as a consequence of such illness. These include, broadly speaking, cases of:

(i) poisoning attributable to the use of handling of, or exposure to the fumes, dust or vapour of specified substances;
(ii) any pathological effect on health due to X-rays, radiating apparatus or radioactive substances; and
(iii) any cataract or ulceration of the eye due to exposure to molten glass or metal, glare from furnaces or exposure to tarry compounds or mineral oils, etc.

VIII. Pneumoconiosis (Compensation) Ordinance

379. Workmen in the construction and quarrying industries are susceptible to a type of occupational hazard causing damages to the lung or other respiratory organs

due to sustained exposure to silica, asbestos and dust. In this connection, the Pneumoconiosis (Compensation) Ordinance was conceived in 1980. The enactment has, in addition, epitomized an unprecedented government departure from its hitherto principle of non-intervention into the private liability of workmen's compensation obligations at the workplace level, by creating a mandatory and officially administered central insurance scheme to finance the payment of compensation to employees or their dependants for incapacity sustained during their employment, provided that the cause is due to either of the two principal types of pneumoconiosis: silicosis and asbestosis.

380. The scheme is hence pioneering in Hong Kong in having instituted the innovative notion of industry-wide collective liability, by creating a central Pneumoconiosis Compensation Fund Board, with its members appointed by the Chief Executive (or the governor prior to 1997). However, the prerogative of prescribing the levy structure and specific rates of the levy rests with the Legislative Council, normally upon the advice given by the Fund Board.

381. The notion of a central insurance fund has emanated essentially from the official awareness of the technical difficulty in ascertaining which employer(s) and his workplace are responsible for causing the contracting of the disease, especially in view of the high mobility of job and place of work among building workers across different construction sites. This system was later extended to cover compensation for loss of the ability to hear due to and arising from work.

382. The procedures for processing this type of compensation are broadly comparable to those available in dealing with ordinary employee compensation cases. However, any such claim for compensation and medical expenses should be notified within 24 months after the date of incapacitation. The role of assessing the incapacity due to this type of disease again rests with the Pneumoconiosis Medical Board upon referral from the Labour Department.

383. Due to the possibility that more than a single employer is involved, the law prescribes that in order to calculate this type of indemnity the level of monthly earnings is to be determined by averaging them over a period of 12 months prior to the date of incapacity. The projected rate for an adult employee, moreover, is to apply if a person suffering from pneumoconiosis is younger than 18 years old, or that of a qualified craftsman if he is an apprentice. For a self-employed or unemployed person (who has been previously engaged in these works) earnings are to be construed from published statistics on the overall average daily wages that prevail for the government-funded construction and building projects. Payment for permanent incapacity may be effected by either of two modes at the recipient's choice. Should a lump sum payment be chosen, the indemnity will be so computed as to allow a built-in margin (which is also medially determined) for future deterioration. Otherwise, payment will be split into two separate instalments whereby the actual degree of deterioration is to be determined in a second assessment for computing the second instalment which occurs six years after the initial round of payment.

384. Settlement of pneumoconiosis compensation payable by the Central Fund Board is by way of certification by the Commissioner for Labour. However, such decisions may be reviewed by the Commissioner upon application from the parties and further appeal is permissible to the District Court, should the results of the review still be found unsatisfactory.

IX. Relationship with Civil Liability at Common Law

385. Injuries sustained by an employee may, or course, be associated with and give rise to a legal liability actionable in court against some other person as a third party. Under such circumstances the injured employee may institute, as concurrent with his statutory claim for employees' compensation, any judicial proceedings to recover damages from the third party. Nevertheless, it is normally necessary to deduct any awarded sum of civil damages thus successfully secured from the employees' compensation already paid by the employer, who may thus recover it as reimbursement.

386. If the injury is attributed to the negligence or other wrongful act of the employer, the injured employee may simultaneously seek from the employer employees' compensation as prescribed by statute as well as sue him for civil damages. Again, the awards obtained under these two separate claims are normally held to be mutually offsetting.

X. Compulsory Insurance

387. By virtue of the subsidiary legislation to the Employees' Compensation Ordinance on compulsory insurance, the Governor in Council of the pre-1997 government has declared it mandatory for every employer to take out insurance with an authorized insurer against the employer's liability under the Employees' Compensation Ordinance. This statutory practice has been sustained after the 1997 political handover.

XI. Suspension of Contract During Absence Due to Incapacity

388. Sick leave due to the incapacity of the employee as a result of industrial injury or occupational disease only serves to suspend the performance of his individual labour contract; it does not constitute any justifiable cause for dissolving the contract. Indeed, it is against the law for the employer to terminate the contract of service of an employee who is incapacitated under circumstances which entitle him to employees' compensation, until the latter has either been medically certified as fit to resume his work or the compensation for permanent incapacity, as determined by and after the relevant medical assessment, becomes payable. Violation by an employer of this legal proscription against any discharge of such a nature constitutes a punishable offence.

XII. Other Penal Sanctions

389. It is also a punishable offence under the Ordinance if an employer makes any deductions from the earnings of his employee in order to defray the cost of insurance against his liability to pay employees' compensation.

Failure on the part of the employer to notify the Commissioner for Labour of an accident occurring to his employee is also an offence, punishable by fines.

XIII. Seamen

390. The Employees' Compensation Ordinance is also applicable to the maritime industry, covering all ranks including the masters, seamen and apprentices provided that they are hired as crew members of a Hong Kong registered vessel. In the case of a foreign ship, the Ordinance may also apply to any crew members recruited in Hong Kong, inasmuch as the employer formally submits (or has agreed to submit) to the jurisdiction of the court in Hong Kong, whether or not the accident happens in Hong Kong waters.

XIV. Proposal for Reforms

391. Now that the statutory provisions on compulsory insurance have been brought into force, it may be consistent with the long-range policy objective of erecting a more equitable and efficient machinery of workmen's compensation in Hong Kong for it to evolve a territory-wide comprehensive scheme of central insurance to cover industrial accidents. The main rationale for advancing future reform in such a direction, it appears, is the argument that a centrally administered insurance scheme can be more cost-effective, and perhaps fairer and more efficient than private arrangements, so that it can contribute better to the accrual of actual compensation pay-out to victims and their families. Under the existing system, it appears that the private insurance industry has been able to squeeze and appropriate, as commission, a significant share of the funds disbursed by the employers as workmen's compensation. The implication is hence the possibility that such payment contributed by the employers could have benefited the injured employees more directly and to a greater extent were it not for the filtering effects of the 'intermediary' agencies of the insurers who tax both parties rather heavily in connection with workmen's compensation.

§3. Sickness Allowance

I. General Provisions

392. If an employee is absent from work because of sickness or accident outside work which temporarily prevents him from performing his contractual duty to work, he may not be paid any wages for the period of his incapacity. Nevertheless, if

caused by a work accident, the absence is not reckoned as sickness and his stipendiary payment is safeguarded at law as periodical payment to indemnify the injured employee for his incapacity on a temporary basis. This notwithstanding, where the sickness is not caused by an industrial accident, the Employment Ordinance still entitles an employee to receive a stipendiary benefit during the period of his sick leave, at a stipulated rate of his normal pay as a sickness allowance.

393. The provision of sickness allowance is, however, not *ipso facto* but subject to the following conditions:

(i) that the employee must have worked continuously for his employer for a period of one month preceding the sickness causing his absence; and
(ii) that the sick leave is not less than four consecutive days. Paid sickness days are hence accumulated at the rate of two paid sickness days for each completed month of the employee's employment during the first 12 months of employment, four paid sickness days for each completed month of employment thereafter. Paid sickness days can be accumulated up to a ceiling of 120 days.

394. The paid sick leave granted has to be supported by a valid medical certificate, which has to be issued by a recognized medical authority (either under a recognized medical scheme operated by the employer, or a hospital, or a registered medical practitioner) specifying the number of days of absence as well as the nature of the sickness or injury causing the absence. Paid sick leave is differentiated into two categories depending upon the relative stringency of validation by the medical authority which the law prescribes.

395. The first category, with an upper limit of 36 days which can be accumulated by an employee, can be 'consumed' subject to a simple procedure that the sickness is supported by a medical certificate issued by a registered medical practitioner or a registered dentist. However, if the sick leave quota under the first category is used up and exhausted, an employee has to make recourse to the second category, where paid sick leave can be 'stored' up to a ceiling of 84 days. Yet the approval of paid sick leave in this latter category is governed by more stringent conditions, inasmuch as

(i) the sick leave has to be supported by a certificate issued by a hospital doctor or dentist; and
(ii) a brief record of the medical investigation into the case and the treatment hence prescribed has to be produced upon the request of the employer.

II. Level of Sickness Allowance

396. The statutory level of sick leave pay, legally labelled as sickness allowance, is prescribed at four-fifths of the employee's normal pay (excluding overtime), having been raised from the previous rate of two-thirds. The payment of such

an allowance has to be made to the employee or his authorized agent not later than the day the employee is next paid his wages. However, where the employee is monthy salaried, the non-deduction of pay for the period of sick leave implies that the employee enjoys full pay already – at a rate more favourable than the legal floor of four-fifths.

III. Other Qualifications Attached to Sickness Allowance

397. There are, in addition, a number of specified exceptions under the Employment Ordinance exempting the employer from his obligation to pay sickness allowance. In this connection, sickness allowance is hence not payable if the unfitness for work is caused by the employee's own serious and willful misconduct – such as indulgence in drug-taking or other unlawful acts, or engaging in fights with malicious intent. Secondly, in order to preclude the accrual of double benefit, the employee may not receive sickness allowance if he is paid already on and for a statutory holiday. By the same token, if he is already entitled to compensation (i.e. periodical payment) under the Employees' Compensation Ordinance for temporary incapacity during the sick leave interval, he is not eligible for sickness allowance pay as well. In the third place, the employee can also lose his right to sickness allowance by failing to accept appropriate medical attention and advice available to him. Specifically, this means that (i) if the employee refuses, without any reasonable excuse, to submit himself for treatment by a company doctor under a recognized medial scheme organized by the employer, or (ii) where hospitalized, he disregards and denies the advice of the company doctor or of the hospital doctor. In either case, sickness allowance is not tenable.

IV. Record of Sickness Allowance

398. An employer is required to maintain a record detailing the entitlement to sickness days and sickness allowance for each of his employees. The entry in the record has to be endorsed by the individual employee within seven days of his return to work from paid sick leave. If an employer fails to maintain such a record, the employee shall be entitled to payment for whatever sick leave is not covered by the record, even if payment has in fact been effected already. An employee can inspect his own sickness allowance record and the Commissioner for Labour is also able to summon, either by written notice to the employer or by notice in the Gazette, any such employer records for a period up to two years preceding his notice.

V. Employment Protection

399. It is not permissible at law for an employer to dissolve the contract of employment of an employee on a paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct. This provision hence confers a measure of security on the employment of the employee absent from work due to

and during his sickness. An employer who violates such a clause commits an act of unlawful dismissal and is liable to recompense the employee with the following:

(i) wages in lieu of notice;
(ii) a further sum equivalent to seven days' pay; and
(iii) any sickness allowance to which the employee is entitled.

§4. Pregnancy and Maternity

I. In General

400. The case of a female employee who is incapacitated due to pregnancy and maternity can also apply for the temporary suspension of her contract of employment due to her confinement on maternity absence from work, as provided in Hong Kong under the Employment Ordinance.

401. To qualify for maternity leave, a female employee needs to have worked for the same employer under a 'continuous contract', provided that she has given notice of her pregnancy to the employer. To protect her because of childbirth, the law entitles the employee to a continuous period of ten weeks' maternity leave. However, if confinement occurs later than the expected date of confinement, she is eligible for a further period of leave equal to the number of days from the day after the expected date of confinement to the actual date of confinement. She may also enjoy an additional period of leave for not more than four weeks on the ground of illness or disability due to her pregnancy or confinement.

II. Employer's Consent and Giving Notice

402. Given the consent of her employer, a pregnant employee may commence her pre-natal leave from two to four weeks before the expected date of confinement. However, if the employee does not decide on the date, or fails to secure her employer's agreement, the employee's leave would begin four weeks immediately before the expected date of confinement and ends six weeks immediately after the actual date of confinement. If her natal confinement occurs before the scheduled maternity leave, her maternity leave would be deemed to commence on the date of confinement. In this case, the employee is obliged to give notice of the date of confinement and her intention to take her ten-week maternity leave to her employer within seven days of her confinement.

403. In addition, a female employee who intends to take any special extended maternity leave is also obliged to give her employer due notice to that effect. Unless it is required by the employer, it is not necessary for the employee on maternity leave to give notice of her intention to return work after confinement. But where required, such notice must not be less than eight days before she returns and shall

state the date on which she returns to work as well as the date on which she was confined, unless the employer has been so notified previously.

III. Payment for Maternity Leave

404. An employee giving birth is eligible for paid maternity leave subject the following conditions:

(i) she has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of her maternity leave;
(ii) she has given notice of pregnancy and her intention to take maternity leave to her employer after pregnancy has been confirmed, by presenting, for example, a medical certificate confirming her pregnancy to the employer; and
(iii) she has produced a medical certificate specifying the expected date of confinement if so required by her employer.

Maternity leave pay, stipulated by law at the level equivalent to four-fifths of the employee's normal wages, is payable for a period of ten weeks. Payment should be effected on the normal pay day of the employee. For an employee employed on piece rates or whose daily wages are variable, the maternity leave pay should be a sum equivalent to the average daily wages earned by her on the days she had worked during every complete wage period (the wage period should last not less than 28 days nor exceed 31 days).

IV. Medical Certification of Maternity Leave

405. A pregnant female employee who has given notice to her employer of her intended maternity leave may have to produce a medical certificate testifying her pregnancy or confinement as well as specifying the (expected) date of confinement. However, such an obligation applies only if so required by her employer. If summoned by the employer, the female employee who intends to take special extended maternity leave must also produce a medial certificate in evidence of the illness or disability arising out of her pregnancy or confinement. Under the law, only a registered medical practitioner or a registered midwife has the proper authority to issue such a medical certificate in evidence of pregnancy, confinement and the expected or actual date of confinement. By the same token, only a registered medical practitioner can issue the working mother with a certificate of illness or disability arising out of pregnancy or confinement.

V. Protection of Employment During Maternity Leave

406. The individual contract of employment remains in force and valid while being suspended as the employee takes her maternity lave. However, to provide

express protection to the female employee in respect of her job tenure, the Employment Ordinance states specifically that maternity leave, whether paid or unpaid, does not in any way break the continuity of employment of a female employee with her present employer. Moreover, during the period between the date on which the pregnant employee gives notice of her intention to take maternity leave and the date on which she is due to return to work (upon the expiry of the leave), a contractual 'freeze' applies to the labour contract, prohibiting any act of the employer to terminate her service.

407. If a pregnant employee is dismissed by her employer before she has served a notice of pregnancy, she may serve such notice immediately after being informed of her dismissal. Under such circumstances, her employer must withdraw the dismissal or the notice of dismissal. However, it may be permissible for the employer to dismiss a pregnant employee where:

(i) the discharge is a case of summary dismissal due to the employee's serious misconduct; or
(ii) the employment is, as expressly agreed between the parties, on probation for a period of not more than 12 weeks and the dismissal is for reasons other than pregnancy.

408. Contravention of the above protective clause on job security during maternity leave is not only a punishable offence but also entitles the aggrieved female employee to a retributory payment if she is eligible, by virtue of the criteria mentioned earlier, to paid maternity leave. This payment is tantamount to what should have accrued to the working mother as the pay for her ten weeks' maternity leave entitlement. In addition, a sum of one month's pay equivalent is payable as payment in lieu of notice for dissolving the contract. Moreover, the employer is liable to prosecution and upon conviction to penalties of a fine attached not merely to acts of unlawful dismissal by the employer during the protected period of maternity leave but also to his defaults in failing to grant the female employee the appropriate maternity leave and the leave pay as well as such contingencies as expenses for medical examination, post-natal medical treatment, etc. As a sequel to an amendment to the Employment Ordinance in the 1990s, punitive legal sanctions have also been extended to prevent an employer from requiring a pregnant employee to handle heavy, hazardous or harmful work.

VI. Paternity Leave

409. There is in the pipeline a proposed enactment on paternity leave of three days, with payment at the minimal level of four-fifths of normal pay. By comparison, comparable benefits in the civil service are better, providing the working father with five days and full pay.

§5. Public and Auxilary Civil Service

410. In Hong Kong, the law is silent governing the provision of leave or otherwise to an employee when he has to suspend temporarily the performance of his labour contract because he is called upon to discharge his civic duties or public service during his normal working hours. Examples of these public duties are to serve as a juror; to participate in electoral activities; to serve as a member of the Executive Council, Legislative Council, or the District Council; to serve on the variety of officially appointed advisory/consultative committees; as well as to attend the training sessions and active duties for auxiliary civil or police services.

411. However, in the specific instance of jury service, the law is unequivocally clear in assigning priority to such a duty over that owed to the employer. This is because the Jury Ordinance makes explicit the legal censure of any employer who discriminates or attempts to discriminate against an employee for performing his duties as a juror (in which case, he is liable to summary prosecution under the Jury Ordinance, Laws of Hong Kong, Chapter 3, Section 33). It is hence obligatory for the employer to grant his employee the necessary leave enabling the latter to perform his juror duties when called to these services.

412. Nevertheless, for the above and other cases of absence from work for performing these varied public duties, the law does not make it an employer's duty to pay or provide a guaranteed income to the employee during the necessary interval of absence. Nevertheless, a Hong Kong citizen is normally paid a special allowance by the government when being called to perform jury duties or duties in the auxiliary,civil or police services.

413. As a general principle, the Employment Ordinance provides that if an employee is absent from work on a day by reason of law, mutual arrangement or the custom of the trade or business, he is deemed to be continuing in the employment of his employer, so that the day shall be reckoned to count as a day on which he has worked for the purpose of determining the continuity of his individual contract of employment.

§6. Annual Leave

414. Annual leave and its taking will not constitute a temporary suspension of the individual contract of employment. This would not break the continuity of employment. The statutory rules governing the scheduling of such vacation and its payment are provided under the Employment Ordinance as have been detailed in an earlier section in Chapter 3.

§7. Technical Disruption of Work and Other Economic Reasons

415. The Employment Ordinance contains 'lay-off' provisions which govern the temporary suspension of the performance of the labour contract due to the shortage or non-provision of work. The law, however, is neither overtly explicit nor unequivocal in specifying the conditions under which suspension or lay-off of such a nature can occur. Yet, at common law, these are in general taken to include 'lay-off' for reasons of loss or reduction in production, unforeseeable breakdown of plant, machinery or office equipment or comparable reasons where there is either express agreement between the parties or an implied condition of employment in the relevant establishment or industry. It has been construed by the Labour Department that the maximum duration of lay-off permissible is not to exceed a half of the total number of normal working days in any period of four consecutive weeks. Otherwise, it must not exceed a third of the total number of working days in any given period of 26 consecutive weeks. Should such a spell of non-provision of work go beyond the 'legally' admissible level, severance pay will become payable to the laid-off employee(s) since the relevant labour contract will have, by implication, been deemed to have been breached or frustrated by the employer. Conversely, the continuity of the individual contract of employment cannot be broken or in any way curtailed by lay-off, so long its duration is within the prescribed and permissible limits.

§8. Bad Weather

416. There are no specific clauses in the Employment Ordinance or any laws in Hong Kong governing the suspension of performance of the individual labour contract due to bad weather. Although Hong Kong is vulnerable to seasonal rainstorms and typhoons (whose gale force wind can cause widespread activity disruptions and property destruction), the law has opted not to prescribe any standard rules or procedures to cover work and the workplace under such emergency situations. Instead, the necessary contingencies are basically left to the mutual agreement between the employer and his employee, taking into account such factors as the nature of the employment and the individual employee's place of residence, the availability of transport, as well as other constraints.

417. However, in its advice offered to the public, the Labour Department encourages employers to reach an agreement in advance with their employees on the procedures governing work and their release from work on the approach of or during a typhoon or rainstorm (the Hong Kong Observatory has instituted a system of escalating signals of warning on the approach of a typhoon of a rainstorm). These voluntary rules are expected to include, *inter alia*, specifying the method of payment or non-payment of wages under various weather conditions. In the absence of any legal stipulations in dealing with work or non-work in inhospitable weather, employers are advised to release their employees, for their safety, at reasonable times, so as to enable them to reach their homes while public transport is still in

service, except for those who have to engage themselves in essential or emergency duties.[19]

§9. Strike

418. The Employment Ordinance expressly provides that the continuity of the individual contract of employment cannot be construed to be broken due to any absence because of a strike (by the employees) or a lock-out (by their employer). Nevertheless, a day on which the employee is absent for these reasons shall not be deemed as a day worked or a day on which he has been provided with work. It may hence be construed, in this connection, that even if the industrial action does not impede directly or break the continuity of the labour contract, it may be yet deemed to do so if the employee fails to work for 18 hours or more in a calendar week because of the strike without advance notice to the employer.

§10. Suspension on Disciplinary Grounds

419. As already mentioned above in an earlier section, the employee may be suspended by the employer for disciplinary reasons, thereby precluding effectively the performance of the labour contract. Such suspension of an employee from work without dissolving the relevant contract can be justified when the employee has committed or is reasonably suspected of having committed some acts which would have entitled the employer to dismiss him summarily. However, the suspension may not last for a period beyond 14 days unless criminal proceedings have been initiated but not concluded within that period. In the latter situation, the suspension may be extended until the completion of such proceedings.

420. For suspension actions of a disciplinary nature to be initiated, an employer is not obliged to give advance notice of his decision before instituting it, nor to pay any wages in lieu of notice. Nor is he obliged to pay the suspended employee any wages, although there is nothing to prevent him from making an *ex gratia* payment if he wishes to do so.

§11. Agreement between the Employer and the Employee

421. It is generally permissible at law for the parties to the labour contract to agree mutually to suspend the performance of their contract for a certain period of time, as in the form of leave with or without pay. Such voluntary suspension of the individual's work duty by mutual consent may apply, *inter alia*, to enable employees to attend full-time courses of study in educational and training institutions, either overseas or local or to pay home visits to their native villages in mainland

19. Such a 'suasive' guideline on the desirable procedures is propagated annually by the Labour Department, via the mass media, in anticipation of the rainy and typhoon seasons.

China, etc. Normally, there is no responsibility incumbent upon the employer to pay the employee wages during such a 'leave' period. However, it has been common as a good personnel or human resource practice, and for advancing staff development and commitment to the organization, for the employer to grant 'full-pay' study leave in sponsoring his employee to pursue a course of study which may contribute to his business.

422. While taking such leave as endorsed by mutual consent, the employee is normally considered to continue in the employ of his employer without any break in 'continuity', similar to instances of statutory holiday, rest day, sick leave, maternity leave or annual leave taking.