

## List of Abbreviations

EIA	Environmental Impact Assessment
EPD	Environmental Protection Department
EU	European Union
NI	Noise Impact Assessment
NSR	Noise Sensitive Receiver
SSSI	Site of Special Scientific Interest

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## General Introduction

### §1. GEOGRAPHY AND POPULATION

#### I. Geography

1. Hong Kong is located to the south-east of the Mainland of China, adjoining the Province of Guangdong, and lies between latitudes  $22^{\circ} 37'$  and  $22^{\circ} 9' N$  and longitudes  $113^{\circ} 52'$  and  $114^{\circ} 30' E$ . Hong Kong covers Hong Kong Island, Lantau Island, the Kowloon Peninsula and the New Territories, including 262 outlying islands. Hong Kong has a land area of  $1,104 \text{ km}^2$ .<sup>1</sup> Between Hong Kong Island and the Kowloon Peninsula lies Victoria Harbour, one of the world's most renowned deepwater harbours. Hong Kong's climate is subtropical, with temperatures dropping below  $10^{\circ}$  Celsius in winter and exceeding  $31^{\circ}$  Celsius in summer. It is warm, sunny and dry in autumn, cool and dry in winter, and hot, humid and rainy from spring to summer.

#### II. Population

2. Hong Kong is one of the most densely populated countries. Its population was approximately 7.37 million in 2016. People of Chinese descent comprise the vast majority of the population, with foreign nationals comprising 8%.<sup>2</sup> The New Territories has the largest share of the population, with its share increasing from 50% in 2001 to 52.3% in 2016. The share of the population on Hong Kong Island decreased from 20% in 2001 to 17.6% in 2016. During the same period, the share for Kowloon remained at around 30%. Population density, as measured by the number of persons per square kilometre of land area, increased from 6,237 in 2001 to 6,777 in 2016 for the territory as a whole. The most densely populated district was Kwun Tong District, with a density of 55,530 persons per square kilometre in 2016. The population densities in districts in the New Territories were generally lower than those in districts on Hong Kong Island and in Kowloon. In 2016, 45.6% of the

1. The information contained in this paragraph and the following paragraphs on Hong Kong population was taken from the website of the Hong Kong Census and Statistics Department, the bi-census of 2016 <http://www.byccensus2016.gov.hk/en/bc-mt.html>. The Hong Kong Government's website is a rich source of updated information and also contains the Hong Kong Yearbook.

population was in public housing (29.2% in rental housing and 16.4% in subsidized home ownership scheme) while 53% of the population was in private housing sector.<sup>3</sup>

Hong Kong has enjoyed an impressively low rate of unemployment. From January 2012 to January 2014, it ranged from 3.2% to 3.5%, and in 2016 it came down again to 3.2%. The labour force increased from 2.8 million in 1991 and 3.724 million in 2011 to 3.91 in 2016.<sup>4</sup>

3. Census and Statistics Ordinance (Cap 316) makes provision for the taking of a census of population and the collection, compilation and publication of statistical information concerning Hong Kong. A population census is generally taken every ten years and the last exercise was carried out in 2011. A bi-census is taken in between two census, and the last bi-census was conducted in 2016.

## §2. LEGAL AND POLITICAL STRUCTURE

4. Hong Kong is a Special Administrative Region of the People's Republic of China. Since the hand over by the British of its sovereignty to the People's Republic of China, Hong Kong is governed by the Hong Kong Basic Law, operating within the unique 'One Country, Two Systems' concept, which guarantees that the Chinese socialist system and policies will not extend to Hong Kong. The system of government that the Basic Law has introduced is virtually a continuation of the previous system of colonial government, subject to a number of technical and substantive modifications.

5. The Basic Law vests legislative power in the Legislative Council, executive power in the executive branch of the government headed by the Chief Executive, and judicial power in the courts. The Legislative Council is an elected body returning thirty-five members through geographical constituencies and thirty-five members through functional constituencies. The Chief Executive, the Head of Hong Kong Government, is selected by the people of Hong Kong and appointed by the Government of the People's Republic of China. The Basic Law provides for the appointment of a broadly representative election committee to select the Chief Executive. The most recent election of a Chief Executive through the election committee was held in March 2017, and the newly elected Chief Executive assumed office on 1 July 2017. The intention of the Basic Law is for Hong Kong to gradually move to a system where the Legislative Council and the Chief Executive are directly elected, on a one-man-one-vote basis. Judicial appointments are through a system of appointment, with safeguards to secure independence of the judiciary.

6. Hong Kong has an Executive-led system of government, where the Executive initiates financial and other public policies for debate and approval by the Legislative Council and is responsible for their implementation. The executive branch of

3. See <https://www.gov.hk/en/about/abouthk/factsheets/docs/employment.pdf>.

4. See <https://www.censtatd.gov.hk/eng/tables/tables.htm>.

the government consists of the Chief Executive, the Head of Hong Kong Government; the Executive Council, appointed by the Chief Executive to advise him; and the Public Service, headed by three secretaries, namely the Chief Secretary, Financial Secretary and the Secretary for Justice.

7. In this constitutional arrangement, the Legislative Council is in many ways subordinate to the Chief Executive. Article 74 imposes a significant limitation on the power of the Legislative Council to initiate legislation:

Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of [the Basic Law] and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.

A Bill passed by the Legislative Council becomes law when it is assented to by the Chief Executive. An Ordinance takes legal effect from the appointed date, that is, the date on which the Chief Executive directs the Ordinance to come into effect. Thus, an ordinance which is not promulgated, or brought into effect, by the Chief Executive will remain in the statute book, but will have no legal effect. A legislative measure that falls outside the restrictions in Article 74 may be proposed by a private member and passed by the Legislative Council, but it cannot become law until it is assented to and promulgated by the Chief Executive.<sup>5</sup>

The Chief Executive must report any law that has been enacted by the Legislative Council to the Chinese Central Government for record. The reporting of a statute duly enacted in Hong Kong for record does not affect the entry into force of such law. If in the view of the Central Government the law does not fall within the legislative competence of the Legislative Council, it may return it in which case it stands invalidated. Such invalidation does not have retrospective effect unless otherwise provided for in Hong Kong law.<sup>6</sup>

8. The Legislative Council has no power to remove the Chief Executive. It may persuade the Chinese Government to remove him by impeaching him as provided by Article 73(9) of the Basic Law:

5. *Leung Kwok Heung and Another v Chief Executive of the HKSAR* [2006] HKEC 239 concerned the Interception of Communications Ordinance (Cap 532), which was introduced as a private member's bill and passed by the Legislative Council, over the opposition of the administration, and assented to by the Governor just three days before the British colonial rule came to an end on 1 July 1997. Realizing that the Bill could not be implemented without the support of the government, the Legislative Council specifically provided in the Bill that it would become operative on a day to be appointed by the Governor (after 1 July 1997 the Chief Executive). Until 2005 when the judicial review application was made, the Chief Executive had not promulgated the bill. The Court of First Instance refused to issue a declaration that the Chief Executive had failed in his duty to promulgate the Ordinance or to issue an order in the nature of mandamus directing the Chief Executive to bring the Ordinance into effect. Affirmed by the Court of Appeal: [2006] HKEC 239.

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If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision.

In January 2013, an unsuccessful attempt was made to impeach the Chief Executive.<sup>7</sup>

9. Hong Kong's constitutional system, therefore, relies for its successful operation on close cooperation between the legislative and executive branches of the government. The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it must implement laws passed by the Legislative Council and in force; it must present regular policy addresses to the Legislative Council; it must answer questions raised by members of the Legislative Council; and it must obtain approval from the Legislative Council for taxation and public expenditure.

10. The judicial branch exists and operates independently of the other two branches of government. Courts have unlimited constitutional jurisdiction in the sense that they can question the constitutionality of legislation, in addition to their extensive powers to review legality of administrative action. As in other common law jurisdictions, the existence of special tribunals is a special feature of the system of dispute settlement in Hong Kong. Being an international centre for commercial dispute resolution, Hong Kong has embraced alternative dispute resolution and the judiciary has taken a special interest in encouraging amicable dispute resolution as an alternative to litigation. The judiciary is also committed to aggressive modernization of litigation processes in order to make courts more accessible.<sup>8</sup>

### I. The Relationship Between the Chinese Central Authorities and Hong Kong

11. Hong Kong is an inalienable part of China, but has been authorized to exercise 'a high degree of autonomy'. Hong Kong is one of the two Special Administrative Regions of China, the other being Macau, both created in pursuance of Article 31 of the Chinese Constitution. The Basic Law is unique because it was

7. See <https://asiancorrespondent.com/2013/01/hk-lawmakers-try-to-impeach-...>

8. See <http://mediainfo.hk/>

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enacted as a national law of China but for the purpose of giving effect to an international treaty between Britain and China, the outgoing and incoming sovereigns.<sup>9</sup> The Basic Law sets out how relations between China and Hong Kong are to be conducted.

12. The power to amend the Basic Law remains with the National People's Congress of China. However, before exercising the power of amendment, the National People's Congress is required to consult the Committee for the Basic Law, which is an advisory body consisting of Mainland and Hong Kong representatives.<sup>10</sup> There have been so far no amendment of the Basic Law. The ultimate power of interpreting the Basic Law rests with the Standing Committee of the National People's Congress.<sup>11</sup> There have so far been five interpretations of the Basic Law. In adjudicating cases, the courts of Hong Kong must follow any interpretation pronounced by the Standing Committee.<sup>12</sup>

13. Hong Kong was a British Crown Colony until the resumption of sovereignty over it was resumed by the People's Republic of China in 1997. Hong Kong is an integral part of China and is not a sovereign independent state. It is an autonomous region within the People's Republic of China, officially known as Hong Kong Special Administrative Region. Hong Kong's interests are represented in international relations by the sovereign state, the People's Republic of China. There is a basic division of powers and functions between the Chinese central authorities and the Hong Kong Special Administrative Region. For instance, foreign affairs and defence are matters for the Central Government. However, a fair proportion of activities of that description may be carried out by the Hong Kong Government, upon authorization.<sup>13</sup> Recognizing Hong Kong's special historical development, socio-economic, cultural, legal and political system, China has granted a high degree of autonomy to Hong Kong.<sup>14</sup> This essentially means that in domestic matters Hong Kong government has freedom to make policies and implement them without any approval being necessary from the People's Republic of China. The Basic Law expressly provides that Chinese national laws, except those which are specified in the Basic Law, have no application in Hong Kong. National laws of China do not apply in Hong Kong, except those relating to 'defence and foreign affairs as well as other matters outside the limits of autonomy of the Region as specified by [the Basic Law]', through their incorporation in Annex III of the Basic Law.<sup>15</sup> The Basic Law

9. Namely, 'The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong', signed on 19 December 1984.

10. Basic Law, Art. 159.

11. Basic Law, Art. 158.

12. See, for instance, *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460 (CA). On 16 January 2017, the Court of Appeal refused leave to appeal to the Court of Final Appeal: *Chief Executive of HKSAR v President of the Legislative Council* [2017] HKEC 53.

13. Basic Law, Arts 13 and 14.

provides that there shall be no interference in Hong Kong's affairs by any department of the Central Government or any local or municipal authority in the rest of China.<sup>16</sup>

## II. Hong Kong's System of Government: The Executive Branch

14. Hong Kong has been given a high degree of autonomy and enjoys executive, legislative, and independent judicial power, including that of final adjudication, in accordance with the Basic Law. As provided by Article 62 of the Basic Law, the Hong Kong Government formulates and implements policies; conducts administrative affairs; conducts external affairs as authorized by the Central People's Government under the Basic Law; draws up and introduces budgets and final accounts; drafts and introduces bills, motions and subordinate legislation; designates officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.

15. The executive branch of the government is headed by the Chief Executive, appointed for a term of five years by the Chinese Central Government, after having been selected or elected through consultations held locally.<sup>17</sup> The main powers and functions of the Chief Executive include: determining government policies; approving the introduction of motions regarding revenues or expenditure to the Legislative Council; signing bills passed and budgets approved by the Legislative Council; and making judicial and public appointments.<sup>18</sup> There is an Executive Council to assist the Chief Executive in policymaking, but the Chief Executive is not bound to accept its advice.<sup>19</sup> The Chief Executive is required to consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council, except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies.<sup>20</sup> Currently, the Executive Council consists of sixteen official members (Chief Secretary, Secretary for Administration, Secretary for Justice and thirteen Secretaries, who head bureaus) and fifteen non-official members.<sup>21</sup>

The Chief Executive is assisted by three secretaries: Chief Secretary for the Administration, Financial Secretary and Secretary for Justice. The Secretary for Justice oversees the Public Service Commission, the Department of Justice, Independent Commission against Corruption, Office of Ombudsman and Audit Commission. The Chief Secretary for the Administration oversees nine bureaus dealing with civil service, education, home affairs, security, constitutional and mainland affairs, environment, transport and housing, labour and welfare, and food and health. There are four bureaus under the supervision of the Financial Secretary: Development, Commerce and Economic Development, Financial Services and

16. Basic Law, Art. 22.

17. Basic Law, Arts 43, 45, 46.

18. Basic Law, Art. 48.

19. Basic Law, Arts 54, 55, 56.

20. Basic Law, Art. 56.

Treasury, Innovation and Technology. Each bureau is headed by a Secretary (such as Secretary for Education) and has under it several government departments and other administrative units such as agencies (for instance, Working Family and Student Financial Assistance Agency), commissions (for instance, the University Grants Commission) and authorities (for instance, Communications Authority). The Chief Secretary for the Administration oversees the Policy Project Coordination Office, Administration Wing and the Efficiency Unit. The Financial Secretary oversees the Hong Kong Monetary Authority and Economic Analysis and Business Facilitation Unit. The Central Policy Unit and the Belt and Road Office are directly under the Chief Executive. Currently, there are thirteen bureaus, of which the ones directly relevant to environmental protection being Environment Bureau, Development Bureau, Transport and Housing Bureau and Food and Health Bureau. Environment Bureau has the smallest number of divisions. It only has one department under it, namely the Environmental Protection Department. Development Bureau and Financial Services and Economic Development Bureau have the highest number of subdivisions. Each Bureau has ten departments or other units under it.<sup>22</sup>

16. Prior to 2002, the heads of bureaus were civil servants and they operated under the leadership of the relevant Secretary. In 2002 a system of accountability was introduced and bureaus heads were no longer to be civil servants but political appointees appointed by and answerable to the Chief Secretary for the Administration, retitled secretaries (such as Secretary for the Environment). In 2008, bureaus were assigned a deputy secretary and an assistant secretary who were likewise politically answerable. Secretaries, deputy secretaries and assistant secretaries could be drawn from the civil service and outside.<sup>23</sup> With the introduction of the political appointments system for the principal officials in 2008, the Civil Service Bureau adopted a Civil Service Code which civil servants are expected to uphold. It sets out the framework within which civil servants are expected to work with politically appointed officials.<sup>24</sup>

## III. Hong Kong's System of Government: The Legislative Branch

17. Hong Kong's legislature, the Legislative Council, is elected for a term of four years.<sup>25</sup> The Legislative Council has the power to pass legislation, approve taxation and public expenditure, debate government policies and matters of public interest and scrutinize government.<sup>26</sup> The power of the Legislative Council to initiate and pass legislation operates in the following way. Any Legislative Council member may propose any bill. A bill introduced by a member is known as a Member's Bill. Where a bill is sponsored by the government, it is called a Government bill. Any member of the Legislative Council may introduce a bill so long as it does

22. See <https://www.gov.hk/en/about/govdirectory/govchart/index.htm>.

23. See 'Consultation Document on Further Development of the Political Appointment System' of 2006 [http://www.info.gov.hk/archive/consult/2006/pa\\_consultation\\_e.pdf](http://www.info.gov.hk/archive/consult/2006/pa_consultation_e.pdf).

24. See Civil Service Code of 2009 at <http://www.csb.gov.hk/english/admin/conduct/1751.html>.

25. Basic Law, Art. 60.

not relate to public expenditure or political structure or the operation of the government. A bill relating to government policies may be introduced in the Legislative Council only with the written consent of the Chief Executive.<sup>27</sup> The primacy of the Legislative Council in its relationship with the government is clearly set out in Article 64 of the Basic Law, which provides as follows:

The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.

A member's bill may deal with any matter that is not excluded by Article 74. For instance a member may introduce a bill which deals not with a matter of general public interest, but a private matter such as the incorporation of a religious or educational institution. Such a bill is known as a private bill.

A bill passed by the Legislative Council will become law when it is assented to and promulgated by the Chief Executive (Article 76 of the Basic Law).

18. Legislative power is entrusted to the Legislative Council which is wholly elected, although not all members are elected by universal franchise on a one-man one-vote system. Thirty-five of its seventy members are elected from geographical constituencies on the basis of universal franchise, while the other thirty-five members are elected from functional constituencies.<sup>28</sup>

19. Decisions in the Legislative Council are generally taken by a majority vote. Bills sponsored by the government may be passed with a simple majority of those present and voting. However, the passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council requires a simple majority vote of each of the two groups of members present: (1) members returned by functional constituencies and (2) members returned by geographical constituencies through direct elections.<sup>29</sup>

20. A bill passed by the Legislative Council of the Hong Kong Special Administrative Region may take effect only after it is signed and promulgated by the Chief Executive. If the Chief Executive considers that a bill passed by the Legislative Council is not compatible with the overall interests of the Region, he or she [the first woman Chief Executive was elected in March 2017 and is scheduled to assume office on 1 July 2017] may return it to the Legislative Council within three months for reconsideration. If the Legislative Council passes the original bill again by not less than two-thirds of all the members, the Chief Executive must sign and promulgate it within one month. If he does not do so, and if consensus still cannot be

27. Basic Law, Art. 74.

28. See Annex II of the Basic Law, as amended in 2010.

29. See Annex II of the Basic Law, 'II. Procedure for voting on bills and motions in the Legislative Council'.

reached after consultations, the Chief Executive may dissolve the Legislative Council.<sup>30</sup> To counter balance his power of veto, Basic Law provides that if the Legislative Council formed after such dissolution passes the same bill with a two-thirds majority, the Chief Executive must sign and promulgate the law. Otherwise, he must resign.<sup>31</sup> Similar provision has been made in relation to the refusal of the Legislative Council to pass the budget presented and any legislation proposed by the government.<sup>32</sup>

#### IV. Hong Kong's System of Government: The Judicial Branch

21. Judicial power is exercised by the courts of Hong Kong, which are to be established by ordinary legislation.<sup>33</sup> Article 83 of the Basic Law provides that the structure, powers and functions of the courts of Hong Kong at all levels shall be prescribed by law. The Basic Law sets out the courts system as consisting of the Court of Final Appeal, the High Court (Court of Appeal and the Court of First Instance together), District Courts, Magistrate's Courts and other special courts.<sup>34</sup> Article 81 further provides that 'the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region'. The Court of Final Appeal has replaced the Privy Council as Hong Kong's highest court of law. Article 82 of the Basic Law provides that the power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal. Such overseas judges are referred to as overseas non-permanent judges.<sup>35</sup> The establishment of the system of courts in Hong under the Hong Kong Basic Law may be briefly explained as follows: The intention of the Basic Law is to continue the system of courts, and their jurisdictional remits, as prevailing at the time the Basic Law came into effect; the only significant change was to set up a new Court of Final Appeal to take over from the Judicial Committee of the Privy Council which was the highest judicial tribunal in Hong Kong under British colonial administration. The Basic Law therefore makes

30. Basic Law, Arts 49, 50.

31. Basic Law, Art. 52(2).

32. Basic Law, Art. 52(3).

33. Basic Law, Art. 80.

34. Basic Law, Art. 81. Special courts in Hong Kong include the Juvenile Court established by the Juvenile Offenders Ordinance (Cap 226) which exercises the powers of a magistrate in proceedings under this ordinance, Lands Tribunal established under the Lands Tribunal Ordinance (Cap 17), Labour Tribunal established under the Labour Ordinance (Cap 25) which has exclusive jurisdiction in relation to matters such as claims in relation to a breach of term relating to minimum wage, Small Claims Tribunal established under the Small Claims Ordinance (Cap 338) and Obscene Articles Tribunal established under the Control of Obscene and Indecent Articles (Cap 390) which can exercise the powers of a magistrate.

special reference to the Court of Final Appeal. It also makes provision for the jurisdictional limitations on Hong Kong courts, in the form of the final authority of constitutional interpretation vested in the Standing Committee of the National People's Congress of the People's Republic of China.

22. Article 158 of the Basic Law provides that the Standing Committee of the National People's Congress of China has the power to interpret any provision of the Basic Law. It goes on to provide that the Standing Committee authorizes the courts of Hong Kong to interpret, on their own, provisions of the Basic Law which are within the limits of the autonomy of Hong Kong. Article 158 provides that Hong Kong courts may interpret provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region. However, if such a question of interpretation of such reserved powers comes before the court and the determination of that question is necessary for the case to be finally disposed of, the court must refer the question to the Standing Committee for its binding interpretation.<sup>36</sup> The relevant provision, Article 158 clarifies the effect of an interpretation: 'When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.'

23. Articles 88, 89 and 90, which are discussed in this and the following three paragraphs, are pivotal to the guarantee of judicial independence. Article 89 provides that judges of Hong Kong courts shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.<sup>37</sup> Article 90 of the Basic Law provides that judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. This follows the guarantee Article 81 holds out: 'The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region' and the direction in Article 84 that the courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region and may refer to precedents of other common law jurisdictions.

24. The Basic Law provides for the independence of the judiciary. Article 85 of the Basic Law provides that the courts of the Hong Kong Special Administrative Region shall exercise judicial power independently free from any interference and that members of the judiciary shall be immune from legal action in the performance

36. See Part VIII of the Basic Law 'Interpretation and Amendment of the Basic Law'.  
37. See Judicial Commission.

of their judicial functions.<sup>38</sup> Article 88 provides that judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

25. Article 89 provides that a judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges. It also provides that the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in the Basic Law.

26. Article 90 provides that in the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court of the Hong Kong Special Administrative Region, the Chief Executive shall, in addition to following the procedures prescribed in Articles 88 and 89 of the Basic Law, obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress for the record.

### §3. SOURCES OF LAW

27. Article 18 of the Basic Law provides that the laws in force in the Hong Kong Special Administrative Region shall be the Basic Law, the laws previously in force in Hong Kong as provided for in Article 8 of the Basic Law, and laws enacted by Hong Kong's legislature. Article 8 describes what is meant by laws previously in force in Hong Kong as 'the common law, rules of equity, ordinances, subordinate legislation and customary law ... except for any that contravene [the Basic Law]'. Article 160 of the Basic Law provides as follows: 'Upon establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region, except for those which the Standing Committee of the National People's Congress declares to be in contravention of [the Basic Law]. If any laws are later discovered to be in contravention of [the Basic

38. See *Ma Kwai Chun v Leong Siu Chung* [2001-2003] HKCLR 286 (CA), and *Tam Mei Kam v HSBC International Trustee Ltd* [2014] HKEC 1189 (CA), where Chu JA observed at [5] as follows: 'The common law principle of judicial immunity is both ancient and well settled. That a judge is absolutely immunised from personal civil liability for any judicial act done in his capacity as a judge, irrespective of whether he acted under gross error or negligence, or was actuated by envy, hatred and malice ...'

Law], they shall be amended or cease to have force in accordance with the procedure as prescribed by [the Basic Law].’ The Standing Committee declared that certain pre-existing statutes contravene the Basic Law.<sup>39</sup> An example of a pre-existing legislation so ruled out is the Application of English Law Ordinance (Cap 88). Similarly, the Standing Committee of the National People’s Congress declared sections 2(3), 3 and 4 of the Bill of Rights Ordinance to contravene the Basic Law and those sections were expunged from the Ordinance. The hierarchy of law in Hong Kong, as in other common law jurisdictions, would be the Basic Law, primary legislation, subsidiary legislation, common law and equity, and custom. International law, which exercises an ever-compelling influence on domestic legal systems, has no direct binding force of law in Hong Kong. A principle of international law will gain binding effect in Hong Kong only if it is incorporated into the domestic law. Several international treaties and conventions, some of environmental concern, have been expressly adopted or given expression in local law.

28. As we have already seen, legislative power is vested in the legislature and laws made by the Legislative Council, which are known as Ordinances, are the primary sources of law, so long as they are consistent with the Basic Law. Hong Kong courts may enquire into the constitutionality of legislation and any law that contravenes the Basic Law may be declared invalid. Article 17 of the Basic Law requires all legislation to be reported to the Central Chinese Government for the record. The Standing Committee of the National People’s Congress of the People’s Republic of China may invalidate any such law that is not ‘in conformity with the provisions of [the Basic Law] regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the Region’. As in other common law jurisdictions, administrative agencies may be given power to make subsidiary legislation, a power which must be granted by ‘parent legislation’. Environmental statutes, for instance, grant power to the Chief Executive to make regulations, which are subsidiary legislation. To be valid, subsidiary legislation must be consistent with the parent legislation and any other primary legislation in force, and must also be consistent with the Basic Law. It means that a subsidiary legislation which is consistent with the parent statute may become ineffectual because the parent statute itself is unconstitutional.

29. Common law and equity rank below legislation as a source of law. Common law in one sense refers to judge-made law. When used in conjunction with equity, common law refers to the body of jurisprudence that was developed in common law courts in England, while equity refers to the jurisprudence that was developed in courts of equity in England. After the amalgamation of courts of common law and equity, courts of law came to be courts of common law and equity administering the two systems of law according to their own peculiar characteristics.

39. See Decision of the Standing Committee of the National People’s Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Art. 160 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Adopted at the Twenty-Fourth Session of the Standing Committee of the Eighth National People’s Congress on 23 February 1997). This appears as Instrument sixteen appended to the Basic Law of Hong Kong. It is also published as A 206 in ‘Hong Kong E-Legislation’ <https://www.elegislation.gov.hk>

30. Equity which was developed as a gloss on common law, and administered by equity courts to ensure justice and fairness, came in later years to be dependent on, and rather strictly regulated by, judicial precedent just as the common law is. While there is some overlap between common law and equity, these two branches of law continue to retain their inherent characteristics. In relation to environmental law, common law plays a more important part. For instance, criminal law provides an important enforcement mechanism to environmental regulation. Equity plays a minor role, for instance, by making its equitable remedies such as injunctions a useful device to ensure compliance with environmental regulation.

31. Local custom as a source of law is rather unimportant in Hong Kong. Chinese customary laws play a limited role in relation to family matters as well as religious matters such as administration of Buddhist temples. Chinese customary laws may not have a part to play in environmental regulation at all.

32. In the area of environmental law, the primary source of law is legislation, the principal statutes being Air Pollution Control Ordinance, Water Pollution Control Ordinance, Noise Control Ordinance, Waste Disposal Ordinance and Environmental Impact Assessment (EIA) Ordinance. Primary legislation is supported by a network of regulations, notices, technical memoranda and codes of practice. The origins of the environmental regulation may be traced to common law regulation of relations between neighbours, especially in relation to nuisance. Common law remedies continue to provide some control over environmentally harmful acts. Hong Kong statutes rely on remedies in the nature of civil enforcement action, such as injunctions, as well as on criminal law for enforcement. The relevance of common law is illustrated in the substantive parts of this work.

33. Common law is primarily concerned with disputes between individuals. In the area of tort law common law intervened to protect property rights against unlawful intrusions. The principal areas where tort law played an important incidental part in protecting the environment are negligence, nuisance and the rule in *Rylands v Fletcher*.<sup>40</sup> Where a person caused harm to the property of the claimant, such as by letting water from his land flood the claimant’s, there lay either a claim in negligence, nuisance, or for strict liability under the rule in *Rylands v Fletcher*, depending on the nature of the intrusion and the surrounding circumstances. The common law remedies exist for the protection of private rights, and protection of the environment can be described as an incidental benefit to the public.<sup>41</sup> Apart from the fact that no action in tort lay except at the suit of a claimant whose personal rights are affected, common law was also deficient in relation to remedies that were available. The onset of environmental legislation addressed both these deficiencies in common law: first, it set up a comprehensive environmental regulatory machinery to

40. [1868] UKHL 1.

41. A common law remedy, such as for nuisance, could coexist with the possible preventive, enforcement or remedial action taken under environmental legislation. In *Chan Ying Wah v Bachy Soletanche Group Ltd* [2005] 2 HKLRD 176, a claim in negligence, nuisance and under the rule in *Rylands v Fletcher* succeeded in relation to an escape of water which damaged a neighbour’s crans



take preventive, enforcement and remedial action; and, second, it provided a diversity of appropriate monitoring and supervisory mechanisms supported by the use of modern technological advances and effective remedies to prevent and remedy environmental harm.

34. As Lord Goff of Chieveley succinctly stated in the celebrated case of *Cambridge Water Co Ltd v Eastern Counties Leather plc*:

The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment, and make the polluter pay for damage to the environment for which he is responsible – as can be seen from the WHO, EEC and national regulations to which I have previously referred. But it does not follow from these developments that a common law principle, such as the rule in *Rylands v Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.<sup>42</sup>

35. Lord Goff concluded:

I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.<sup>43</sup>

36. Legislative regulation in the area of environmental protection, as in other regulatory areas, is more efficient than common law which is developed by judges through cases which come up before them for resolution.

37. The first advantage of legislation is that it can set up a comprehensive legislative regulatory framework, setting out environmental standards,<sup>44</sup> prohibiting

42. [1994] 2 AC 264 at 305 (HL).

43. *Ibid.* See Anton Cooray, 'Environmental Torts', in Kemal Bokhary (ed.), *Tort Law and Practice in Hong Kong* (Sweet & Maxwell, Hong Kong, 2014).

44. For instance, Part II of the Water Pollution Control Ordinance, Cap 358, enables the Chief Executive to declare any part of Hong Kong a water control zone (s. 4) and requires the Secretary to establish for each such water control zone a water quality objective, meaning 'the quality which, in the opinion of the Secretary, should be achieved and maintained in order to promote the conservation and best use of those waters in the public interest' (s. 5). Once a water quality objective has been established, it is the duty of the Authority to achieve the such water quality objective as soon as rea-

certain acts (such as polluting the environment),<sup>45</sup> requiring a person convicted of a pollution offence to take remedial action where environmental harm has been done (such as under the Water Pollution Control Ordinance, Cap 358),<sup>46</sup> carrying out such remedial work by the Authority if such person fails to comply with such requirement,<sup>47</sup> regulating certain potentially harmful activities through licensing,<sup>48</sup> mandating certain action (such as carry out an environmental impact assessment for any proposed designated project,<sup>49</sup> obtaining and complying with an environmental licence), setting up agencies to ensure environmental friendliness of developmental activities (such as by overseeing EIAs), ensuring that regulated activities conform to the relevant standards and requirements (such as by requiring regular reporting by operators and through site inspections), and taking enforcement action (such as requiring operators to comply with licence conditions or prosecuting offenders).

38. An important feature of environmental legislation is the use of criminal sanctions as a deterrent. The five main environmental statutes (Air Pollution Control Ordinance, Water Pollution Control Ordinance, Noise Control Ordinance, Waste Disposal Ordinance and Environmental Impact Assessment Ordinance) create several types of offences: they include substantive environmental offences such as emitting smoke, discharging effluents or making noise in contravention of statutory prohibitions or restrictions; offences of failure to comply with statutory notices which require compliance with environmental regulations. Where an environmental statute requires a licence or permit for the carrying out of certain activities, such as discharging matter into Hong Kong waters, offences are created to serve two purposes: (a) to ensure due compliance with the conditions of the licence or permit and (b) to ensure that the licence or permit is not obtained by withholding material information or by providing materially incorrect information. It is common for environmental statutes to create offences in relation to the enforcement powers of the

45. For instance, Part III of the Water Pollution Control Ordinance (Cap 358) prohibits the discharge of any waste or polluting matter into the waters of Hong Kong and internal waters (s. 8) and the discharge of any prohibited matter into communal waters and communal drains (s. 9).

46. Where any person has been convicted of an offence of prohibited discharge under section 8 (such as discharging any waste or polluting matter into the waters of Hong Kong in a water control zone, or discharging any poisonous or noxious matter into the waters of Hong Kong) or section 9 (such as discharging any matter into a communal sewer or communal drain in a water control zone, other than discharging domestic sewage into permitted communal sewers and communal drains), the Authority may, if he is of the opinion that: (a) any part of the waters of Hong Kong suffered continuing damage as a direct result of the commission of the offence; and (b) it is reasonably practicable to restore or partially restore that part to the condition it was in before the commission of the offence, by notice in writing require the person so convicted to carry out such work as is specified in the notice to effect such restoration or partial restoration. Such restoration work must be carried out as directed by the Authority in the manner specified and before the date specified in such notice (s. 13).

47. Section 13(3) of the Water Pollution Control Ordinance (Cap 358) provides that (as seen in footnote 64) where the person on whom a notice requiring restoration of waters has failed to comply with the notice to carry out such restoration work or any part of restoration, the Authority may carry out such restoration work and recover the cost of doing so.

48. Licensing is a common regulatory mechanism in environmental regulation

Authority and of authorized officers: (a) offences of failure to cooperate with authorized officers as required by law and (b) offences of unauthorized disclosure of information that an authorized officer has acquired in the course of carrying out his duties.

39. Courts have recognized that, because of the vital importance of protecting the environment by punishing acts detrimental to the environment, the legislature is justified in imposing strict or absolute liability for environmental offences. The discussion of offences under the various environmental statutes will provide illustrations of such offences of strict and absolute liability. We may now briefly consider the difference between strict liability offences and absolute liability offences.<sup>50</sup> Strict liability refers to a situation where the prosecution needs to establish only *actus reus* (that is the commission of the prohibited act or failure to act) but the defendant may set up a common law or statutory defence. Absolute liability refers to situations where the statutory formulation of the offence leaves no room for the defendant to plead a statutory defence or a common law defence. In *Kulemesin v HKSAR*,<sup>51</sup> Ribeiro PJ reformulated the approach that he had proposed in *Hin Lin Yee v HKSAR*,<sup>52</sup> in identifying the different alternative interpretations that are possible of statutory offences that exclude or do not refer to *mens rea*:

- (a) The presumption of *mens rea* has not been displaced by the statute presumption. (the prosecution must prove both *mens rea* and *actus reus*).
- (b) The prosecution must prove only that the defendant is responsible for the prohibited act or failure to act. However, if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances of his conduct were such that, if true, liability would not attach, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief.
- (c) The presumption of *mens rea* has been displaced so that the prosecution need not prove *mens rea* but the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances of his conduct were such that, if true, he would not be guilty of the offence.
- (d) The presumption has been displaced and the accused is confined to relying on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives mentioned above; and
- (e) The presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind regarding the relevant elements of the offence in question.

50. See Anton Cooray 'Environmental Offences' Chapter 40 in *Archbold Hong Kong 2021* (Sweet & Maxwell, Hong Kong, 2021).

51. (2013) 16 HKCFAR 195 (CFA), [83].

52. (2011) 14 HKCFAR 195 (CFA), [83].

40. As a general rule of common law, the prosecution must prove that the prohibited conduct is attributable to the defendant who acted with a guilty mind. This is commonly referred to as coincidence of *actus reus* and *mens rea*. The need to prove the mental element of an offence may be relaxed by legislation. Sometimes an environmental statute expressly provides that no mental element has to be established. For instance, section 10 of the Water Pollution Control Ordinance provides that where 'it is alleged that the defendant caused matter to enter the waters of Hong Kong or inland waters or a communal sewer or communal drain or caused matter to be deposited as provided in s. 2(3) it shall not be necessary for the prosecution to prove that the acts or omissions in question were accompanied by any intention, knowledge or negligence on the part of the defendant as to any element of the offence'. However, liability is not absolute because the defendant may plead any of the defences set out in section 12, as appropriate, such as that the discharge or deposit was made in an emergency in order to avoid danger to life or property and as soon as was reasonably practicable he informed the Authority thereof in writing, or that he acted under instructions given to him by his employer and he exercised the care and took the steps that the court, having regard to his position as an employee, considers reasonable in the circumstances to avoid the occurrence of the prohibited discharge or deposit. There, the liability is strict and not absolute.

41. Sometimes, statutory offences do not explicitly refer to any mental element as part of the definition of the offence. It is then the role of judges to decide as a matter of statutory interpretation whether *mens rea* is or is not an element of the offence. The starting point is the presumption that *mens rea* is an essential element of any common law or statutory offence. The presumption may be displaced only when it is clearly or by necessary implication the intention of the legislature to do so. In what circumstance may the legislature be justified in displacing the presumption of *mens rea*, which conflicts with the presumption of innocence? The presumption may be displaced where the relevant statute is concerned with an issue of social concern. As the Privy Council emphatically stated in the case of *Gammon (Hong Kong) Ltd v Attorney General*, even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability or absolute liability will effectively promote the object of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.<sup>53</sup> This decision of the Privy Council has been followed in relation to environmental offences for the following reasons:

53. *Gammon (Hong Kong) Ltd v Attorney General* [1984] 2 All ER 503 (PC), 508. See also *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 (CFA), where the Court of Final Appeal endorsed the view taken in *Gammon* case that absolute liability only arises where such conclusion compelling and that regulatory nature of such offence was insufficient for imposition of absolute liability; it must serve some useful purpose.