

Course Manual
Certificate in Legal Studies

Hong Kong Legal System and Legal Method



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Chapter 1

Introduction to Law and Legal Systems

This chapter introduces important skills related to legal problem solving and illustrates these skills in the context of the following questions:

1. What is the meaning of law and legal system?
2. What are the elements of a legal system?
3. What are the general characteristics of a common law system?
4. What systems of law are applicable to Hong Kong?

Be aware that this chapter is difficult but important as it introduces you to many issues and topics that will be developed in later chapters. As you progress through the text you will see more clearly how the pieces fit together.

Preliminary Reading

The Legal System in Hong Kong (www.doj.gov.hk/eng/legal/index.htm).

1.1 Learning Legal Skills

At its most practical level, law is a response to human affairs. People go to a lawyer when they have a problem that requires legal advice and assistance. The lawyer analyses the problem, and while he or she may advise that the problem be solved in a non-legal way, the lawyer has still taken the law into account and arrived at the advice given by using legal skills. A lawyer cannot reach the conclusion that non-legal means are appropriate without first considering what the law is and whether it applies in the circumstances of the case.

So what is “law”, what are “legal skills” and how does a student learn them? In the pages that follow you will be presented with activities and exercises to complete that are carefully designed to help you develop key legal skills and acquire legal knowledge in the different subject areas of law. But first is an introduction to the four different operations that you will need to undertake when solving legal problems, whether in an academic or professional context. These operations provide a framework for studying all areas of the law and are therefore relevant to the entire course.

1.1.1 Operations

1. Analysing facts - *identifying events and acts* in a particular situation in order to *shed light on the nature of the problem*.



2. Identifying applicable laws - *discovering* legal doctrine that *might* be *relevant* to that situation.
3. Analysing doctrine - *classifying* rules in terms of their component parts or elements in order to see if the law is *capable* of applying to the situation, and *interpreting* the meaning of rules *in cases of doubt*.
4. Applying the rules to the facts - *considering* whether the given facts are sufficiently similar to the elements of the rule for the rule to apply to the facts; using *legal reasoning* to *justify* conclusions.

The words in italics illustrate the kinds of tasks that are commonly required by each of the operations, and the purposes for which those tasks are carried out. Note that the tasks listed are not intended to be exhaustive. The descriptions are presented at this stage in order to give you a general idea of the sorts of mental operations involved in legal problem solving and legal study.

1.1.2 Caveats

A caveat is a warning or a caution to be careful before taking a step that might have adverse consequences. It is used in this text to warn you to stop and think about something before you move on. Each caveat contains an important message with respect to learning the law.

Caution is required when dealing with three issues:

1. Problems are not solved by carrying out the operations in a purely mechanical way. As will become clear, legal problems are rarely simple and often involve areas of doubt that require you to consider alternative possible solutions and alternative interpretations of data.
2. The operations can be performed effectively only by developing the skills required. At a minimum, law students and lawyers must be able to “read” both facts and law. The word “read” is emphasised because legal texts must not only be read, but also must be understood. For this purpose, it is necessary to acquire and develop techniques to identify relevant factual information and techniques to help you make sense of legal texts.



3. The results you reach by applying the operations must in general be communicated to others, whether in the form of assignments and examinations, memoranda or other legal instruments. The thinking skills that you use in the operations must go hand in hand with your ability to communicate your ideas and information both orally and in writing, and in a format that is appropriate and effective in a given situation. Legal communications differ from other forms of communication in some respects. In particular, lawyers use language in specialised ways and the law has a specialised vocabulary, words which either have no counterpart in ordinary language, or which have a meaning different from that in everyday use.

The activities contained within these pages offer many opportunities to perform the four operations, to learn how to read legal texts and to communicate effectively. But the processes are complex, and can be learned only over time and with practice.

1.2 The Nature and Function of Law

Asking the question “What is law?” is rather like asking “What is an orange?”. People know what an orange looks like but most would find it difficult to give precise reasons why it is an orange. We are faced with exactly the same kind of problem when we try to define the essence of law.

When faced with a concept like “the law” that might be difficult to define, a good approach is to examine the elements or characteristics that are commonly associated with it. For instance, the concept of an orange is usually associated with one or more of its features: colour, shape, taste or texture. These features, or attributes, enable an object to be identified and to be described as an orange, and to distinguish an orange from, say, an apple.

We may apply the same approach to gain an idea of how the terms law and legal system are understood by academic and practising lawyers.

Preparatory Exercise

History Club: exploring the concepts of law and legal system

The purpose of this activity is to encourage you to think about the characteristics of law and legal systems.

Data

You are a member of the Hong Kong History Club, established in 1975. The Club’s Constitution provides as follows:

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1. The Club shall be managed by a Committee of three members.
2. The Committee shall have the power to:
 - a. Make rules, which shall be binding on the members of the Club.
 - b. Hear and determine disputes between members.
 - c. Decide whether the Club's facilities may be used by non-members.

The Committee has made the following rules:

1. An annual subscriptions of \$1,000 shall be paid on 31 March in the year in which it falls due.
2. Smoking is not allowed on Club premises.
3. Any member found smoking on Club premises shall be liable to pay the sum of \$5,000 or such other sum as the Committee shall in its absolute discretion think fit. The decision of the Committee shall be final.
4. Members are entitled to use the Club's library free of charge.

The Club has entered into an arrangement with Silas Wong, the owner of a garden adjoining the Club's premises, to use his garden between the hours of 9.00 am and 6.00 pm every day except Sunday. Wong is not a member of the Club. One of the Club's members, James Chan, was recently informed of the Committee's decision to require him to pay \$10,000 after he was found in the garden with a lighted cigarette in his hand. Chan has refused to pay. He claims that the Club has no power to fine him without giving him an opportunity to be heard; that he has not broken any rules; and that, even if he had, a fine of \$10,000 is excessive.

Tasks

1. The data can be organised into the following categories:
 - a. Facts
 - b. Rules
 - c. Opinions

Provide at least one example for each category. For the purposes of this exercise you may assume that the data are true and that the facts can be proved.

2. Take each individual rule and state whether it is a prohibition, requirement or permission. Provide at least one example for each category.

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3. Choose the right answer in the following statements:

The Committee's power to:

- a. make binding rules is a legislative/judicial/executive process (choose only one).
 - b. hear and determine disputes between members is a legislative/judicial/executive process (choose only one).
 - c. manage the Club is a legislative/judicial/executive process (choose only one).
4. A legal institution is an organisation with the power to make, administer or enforce rules.
- a. Identify the institution that is part of the Hong Kong History Club.
 - b. What kind of institution is it - legislative, judicial or executive?
5. A legislator is a person who makes law or who is a member of a legislative body, such as the Legislative Council in Hong Kong (LegCo for short). What name would you give to a person who:
- a. Advises on the law?
 - b. Adjudicates in a court of law?
 - c. Implements the law?

Method

This activity may be done individually, in pairs or in groups.

1.3 Legal Relationships

What does the History Club exercise tell us about the concept of law, and the idea of a legal system? Like the History Club, law is a social phenomenon. Law does not exist in a vacuum. It is fundamentally concerned with relations between persons.

1.3.1 Relationships in fact

Relationships between people arise in a great variety of circumstances and situations. These are the facts of everyday life, the things, events and acts that bring people together. For instance, natural events such as earthquakes and typhoons may unite complete strangers in a common cause.

On a more specific level, a new relationship is formed when people join the History Club. The concept of membership is used to describe this type of relationship. A different



relationship arises under the arrangement entered into by the Club and Wong, although we cannot say precisely what type of relationship it is and, therefore, whether it is recognised by the law. It could be an act of charity or a commercial agreement, but more facts are needed before a decision can be taken.

The law draws a distinction between what is fact and what is law. The distinction is important for various technical reasons, including whether a question in a jury trial should be left to the jury or be determined by the judge, or whether there is a right of appeal from a decision of a lower court (see Chapter 7), or whether a statement by a judge is capable of being a rule of law (see Chapter 5). These are matters arising in relation to court proceedings, but the distinction is equally important in determining what advice should be given by a lawyer to a client or by a law student answering an academic question.

Caveat: Pay attention to facts

Law responds to and affects, or has the capacity to affect, almost everything people do or wish to do. Because of this, it is essential to ascertain and describe the facts as accurately as possible. This is the first step in deciding whether those facts give rise to any legal consequences in terms of rights, duties, powers or liabilities. At a minimum, note details concerning:

- a. the situation, that is, what has happened: circumstances, things, events, acts and states of affairs;
- b. the persons involved or affected, that is their conduct, needs or wants, and their status or capacity (if known); and
- c. where possible, the claims and denials made, or likely to be made, by the persons in those circumstances.

We shall refer to these facts as the “given facts” to distinguish them from the “legal facts”, which are the facts specified in a legal rule (see below). The distinction is important because not every fact is legally relevant.

Ascertaining the facts, or alleged facts, is a necessary step in identifying the nature of the problem or problems arising from the situation.

Having completed the first task in the History Club case you now have the necessary facts to move on and consider whether they have any legal significance.



1.3.2 Relationships in law

The lawyer or law student must analyse the given facts to see if they give rise to any legal consequences and, if so, the nature of those consequences.

The law is interested in factual relationships only insofar as they have legal consequences. In general terms a legal relationship exists if the law attaches legal consequences to one or more persons in the given factual situation.

The variety of legal relationships is so great that it is probably impossible to classify them all. For practical purposes, it is sufficient to distinguish a few very general types of relationships as a starting point for determining whether any relationship might exist, without making any claim that the list is complete.

There are four important types of legal relationship that may attach to persons: duty, right, power and liability:

1. **Duty** - A duty or obligation exists where a person is bound to do or not to do something. Duties limit freedoms and thus create burdens.
2. **Right** - In very general terms a legal right refers to anything that a person is entitled to and which the law regards as worthy of protection. Rights uphold freedoms and thus involve benefits.
3. **Power** - The essence of a power in law is the authority to bring about change in legal relationships. A power confers a discretion and as such is an instance of a right in the sense that the holder of the power has the freedom to choose whether to exercise it or not.
4. **Liability** - as used in this text, “liability” refers to the circumstances in which the law holds a person legally responsible for his or her actions, for the consequences of an event, or for a particular state of affairs. Liability may be civil or criminal, depending upon the nature of the proceedings. Criminal proceedings involve the prosecution of a person for an offence. Civil proceedings involve a claim that the person is legally liable. A right of action is a right to institute civil proceedings for a judicial remedy or relief from a court of law.

A claim is an assertion that a duty or right, or some other legal relationship, exists in a given situation. It is essentially an opinion or belief rather than an established fact. If we look again at the History Club example above, Chan is making a claim that he is not bound to pay the fine. The claim must be founded upon a rule of law that imposes liability upon the defendant to make redress to the plaintiff for a wrong done to him

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and for which the defendant is legally responsible (*Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501). In Chan's case, the reasons used in support of the claim may be summarised as follows:

- There was no duty because Chan had a right to be heard, which the Committee had disregarded; the Committee had no right to fine him because it did not follow the correct procedures.
- There was no breach as the no smoking rule did not apply to these facts.
- The sanction was improper because the Committee's powers to order him to pay the money were limited by a principle or rule.

A claim presupposes that there is some doubt about a matter that must be resolved.

Activity

Relationship in fact v relationship in law

Data

Consider the following:

- a. John gives a box of chocolate to Mary.
- b. Jacky owes Julia \$1,000.
- c. Jessica will go to Japan with Michelle next month.
- d. Peter has signed a partnership agreement with William.

Task

Which of the above is a relationship in fact? Which of the above is a relationship in law?

Method

This activity may be done individually, in pairs or in groups.

1.4 Legal Personality

Most legal questions concern the existence and enforceability of rights, powers, duties and liabilities. It is important to bear in mind that legal relationships attach to persons. However, the legal meaning of person is wider than that in ordinary usage.

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This section explains the concept of “legal personality”. Only a legal person can be bound to legal duties, can have legal rights and can bring and defend claims in legal proceedings. Three important rights possessed by legal persons are the right to:

- sue and be sued;
- own, use and dispose of property; and
- enter into contractual relationships with natural persons and/or other legal person entities recognised by law.

“Person” was originally defined as meaning natural persons, but now also includes artificial entities recognised by the law for certain purposes. Artificial entities are also called “juridical persons” because they are assumed to be persons in law. They have no existence except for the purposes of the law.

1.4.1 Legal persons in Hong Kong

The types of entity recognised, and the extent of their rights and duties, depends upon the particular legal system. Artificial persons recognised by the Hong Kong legal system are:

- a. The state - the state includes the Hong Kong Government, which is a juridical person under the Basic Law (*Fairland Overseas Development Co Ltd v Secretary for Justice* [2007] 4 HKLRD 949).

Tip: Note how the case is cited as authority for the legal proposition. Proper citation is important for finding the sources of law

- b. Corporations - a corporation is an entity separate from an individual legal person or persons. Corporations are established by an act or acts of incorporation. A typical example is companies registered under the Companies Ordinance (Cap 622).

Activity

Non-persons: an exercise in application

Data

The constitution of the Hong Kong History Club states that its mission is to promote better understanding of Hong Kong’s colonial past. The Club actively supports educational research, publishes research findings and allows access to its archives to members and to the community free of charge.

**Task**

Is the History Club a legal person?

Method

This activity should be done in groups.

1.4.2 Non-legal persons in Hong Kong: unincorporated associations

It is somewhat odd to talk about “non-persons”, but it is useful in this context to identify an association of people that is not recognised as having legal personality in Hong Kong, namely an unincorporated association. An unincorporated association is a collection of individuals who agree to form a group for non-profit making purposes.

Where two or more persons have joined together in some common interest and for some common purpose, a legal question may arise as to whether such a collection of individuals is a legal person or whether it is an unincorporated association, which is not a legal person.

1.5 Legal Capacity

Legal personality tells us only the meaning of “person” for the purposes of the law. It does not explain how or when a legal person may create legal relationships. The relevant legal concept for that purpose is “capacity”, which is the power to acquire and exercise specific legal rights and obligations. Capacity is important because it enables legal persons to do things or to bring about change. For example, capacity allows legal persons to enter into contracts with others, thereby creating new or modifying existing legal duties, rights, powers or immunities.

The general rule is that an adult person has full capacity to determine his or her own relations and those of others with whom he or she transacts. A person becomes an adult in Hong Kong at the age of 18.

The capacity of a corporation may be limited by its constitution or the ordinance under which it is created. Traditionally, at common law a company could only carry out transactions that were within or incidental to its stated objects clause, or which were allowed by the legislation that created the corporation. In Hong Kong, up until 1997, a company’s memorandum of association had to include an objects clause, but this is now optional. If the company chooses not to state its objects, it has the capacity, rights, powers and privileges of a natural person.



1.6 Legal Status

Capacity may also be contrasted with a person's status, a condition in life that is more or less static. For instance, marriage is a status.

1.7 How Legal Relationships Arise

For any legal relationship to exist there must be some act, omission or state of affairs that brings two or more people into contact with each other. Broadly speaking, legal relationships arise either by an act of the parties or by the operation of law.

1.7.1 Act of parties

An act of the parties is an act of will or intention on the part of a legal person or persons to bring about a certain consequence.

The best known act of the parties between legal persons is the formation of a contract, under which the parties to the contract agree to be bound to perform the terms and conditions of the contract.

1.7.2 Operation of law

Relationships arising by operation of law do not depend upon intention. Instead it is the law itself that operates in a particular set of circumstances to bring about a particular result. In terms of quantity, the most important source of duties imposed by operation of law are those created by legislation.

In civil law, torts are arguably the best-known example of duties arising by operation of law. For instance, if a balcony falls from a building and injures a passer-by, there is no obvious relationship between the passer-by and the occupiers of the building. But the passer-by will have an action for damages (that is, monetary compensation) if the injury was caused by the negligence of a person upon whom the law imposes a duty of care.

It should be noted that a claim made in legal proceedings must be made by a legal person against another specific person or persons.

1.8 Law as "Rules"

One commonly held view of the law is that it is a system of rules or a set of legal propositions. While this is not a completely accurate description, there is no doubt that

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law students, lawyers and courts spend a great deal of time analysing and applying legal rules of one kind or another to the facts of cases. So what are rules? Why are they needed? How do we know what the applicable rules are in any given situation? How does the structure of a rule help us to decide whether relationships between persons in fact give rise to legal duties and rights?

1.8.1 Nature and function of rules

Every human group must establish arrangements to structure or organise relationships between its members. Such arrangements are commonly referred to as rules. A rule is a general directive that prescribes the type of conduct required, permitted or forbidden in the situations covered by the rule. This is illustrated by the History Club rules noted above. More specifically, Rule 1 is a duty taking the form of a requirement; Rule 2 is a duty in the form of a prohibition; Rule 4 is a right in the form of an entitlement; and Rule 3 is a duty arising as a result of breach of a prior prohibition, the duty not to smoke.

1.8.2 Framework rules

At the most general level, we may note three distinct types of arrangements that may form the framework for legal rules:

1. Constitutional arrangements

Constitutional arrangements provide for the organs of government of a state, and specify the duties and powers of the different branches of government. This function is performed in Hong Kong by the Basic Law of The Hong Kong Special Administrative Region of The People's Republic of China.

Rules concerning relationships between the state and its subjects may also be regarded as constitutional (see Chapter 2), even if they have emerged from the settlement of disputes through the process of adjudication in the courts (see Chapter 7).

2. Substantive arrangements

Substantive arrangements refer to the duties and rights of persons. They include rules that declare or affirm duties and rights, and rules that establish the conditions on which rights and duties depend.

3. Procedural arrangements

Procedural rules refer to any kind of process involved in the enforcement of duties and rights, including civil and criminal rules of procedure and rules governing the jurisdiction of the courts (see Chapter 7).

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1.8.3 Determining whether a legal rule might be applicable to a given set of facts

Whether a relationship between persons amounts to a legal relationship, in which legal rights or obligations attach to the persons concerned, depends on whether the law recognises that relationship. This is why lawyers and law students must take steps to identify the law or laws that might be applicable to the facts of a particular case. Having ascertained the facts, or alleged facts as they may be, three steps may be taken to determine whether a rule might be applicable to those facts:

1. Where two or more systems of law might be applicable, identify which system of laws governs the situation.
2. Identify whether there is any rule of law in the applicable system of laws that might be relevant to the given facts. This involves checking the various classifications of laws (see Chapter 2), and identifying legal sources (see Chapter 3).
3. Having identified laws that might be applicable, ascertain whether the given facts fall within the conditions necessary for the application of the relevant rule or rules. If not, then that rule is not applicable in the instant case. If it is not possible to rule out a particular law, then whether the rule applies is a question of application.

1.8.4 Structure of rules

One way of finding out whether a particular rule is potentially relevant or applies to the given facts is to focus on the structure of rules. This involves identifying the elements or components of the rule, and how they fit together.

Rules have been described as “hypothetical statements establishing that if certain facts are found, certain legal consequences will follow” (Stone, J, *Legal System and Lawyers’ Reasoning*, Stanford, Stanford University Press, 1964 at p 199). This is usually expressed as a conditional statement in the following form:

“If ... [insert legal conditions] then ... [insert legal consequences]”.

The first part states all the facts that are necessary to produce the stated consequences. They are the conditions that must be established if the rule is to apply to the given situation. Once the legal facts have been noted, they may then be compared with the given facts to see if there is a match. If there is, or a court finds that the given facts satisfy the factual conditions of the rule, the rule will apply to the case and the legal consequences will follow.



In the following example of a rule using the “if...then” formula, the conditions are numbered to emphasise the fact that the factual predicate usually involves a combination of legal facts:

History Club, Rule 3:

“Any member found smoking on Club premises shall be liable to pay the sum of \$5,000 or such other sum as the Committee shall in its absolute discretion think fit.”

This rule may be reformulated as follows:

If [1] Any member [is]
[2] found smoking
[3] on Club premises,

Then he or she shall be liable to pay the sum of \$5,000 or such other sum as the Committee shall in its absolute discretion think fit.

1.8.5 Illuminating the nature of legal relations

Organising a rule using the “if...then” formula helps us read legal rules and understand what is meant by a legal relationship. In the History Club example, the distinction between the factual predicate and the consequences of the rule is clearly revealed.

The factual predicate shows the:

1. Persons covered by the rule (members of the Club).
2. Type of situation to which the rule applies (the relevant events, acts or state of affairs).
3. Type of conduct to which the rule refers (smoking).

The consequences statement shows the:

1. Duties or rights attached to the type of situation specified in the factual predicate. The word liable means that a person is responsible at law or is under a legally enforceable obligation.
2. Character of the duty or right, that is, whether the conduct is required, permitted or forbidden.

Caveat: Don't jump to conclusions

The “if...then” formula may give the false impression that rules are always so clear that solving a legal problem is simply a question of proving a particular set of facts. While



that may be true of some rules, it is the exception rather than the rule. In most cases the rules or the facts are more or less uncertain. Among the issues that can create doubt are:

1. Rules are expressed very generally

One reason for uncertainty is that the law is often expressed in very general terms, making it difficult to determine with certainty whether a particular set of facts is or is not covered by the rule.

2. Rules are open-textured

The meaning of words is rarely closed or fixed for all time. The core meaning of a word may be clear, making it possible to decide that it definitely does or does not apply to a given set of facts. But most words are open-textured, that is they have a penumbra of meaning, a shadow or fuzzy area, which is manifested only when someone is called upon to apply a rule to a particular situation.

For instance, in our History Club example, Chan is found with a lighted cigarette in his hand in a garden that is used but not owned by the Club. Rules 2 and 3 will apply if the phrase “on Club premises” extends to premises that are being used by the Club. The issue is critical to the whole case against Chan. If the garden is not Club premises, then neither Rule 2 nor Rule 3 applies. The answer is not obvious. In such circumstances it is necessary to interpret the rule, or one or more of its components, before any decision can be made that it is irrelevant or does not apply to the facts.

3. Rules contain concepts that need to be defined

The conditions of a legal rule are often expressed using concepts that must be defined before any decision can be taken about whether the rule applies. For instance, what is the meaning of “smoking” in the History Club’s Rule 2? What is the meaning of “theft”?

Activity

Uncovering theft: An exercise in structuring a legal rule

The purpose of this activity is to reinforce understanding of the structure of a legal rule.

Data

Section 2 of the Theft Ordinance (Cap 210) states:

“A person commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.”

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Task

Convert the above rule into a conditional statement using the “if...then” formula. Use consecutive numbers to separate the elements of the factual predicate.

Method

This is an individual activity. Compare your effort with at least one other person.

1.9 Law as “Process”

Every human group must have some arrangements for settling disputes between its members. The group would also have to think about whether new rules should be added or old rules changed and, if so, to implement the changes. For practical reasons there must also be some means of enforcing the rules, even though enforceability is not a necessary requirement for a rule.

Stated another way, there must be some processes for making, administering and enforcing the law. In systems that are based upon the English legal system, like ours in Hong Kong, these processes are related to the doctrine of the separation of powers. Separation of powers is based upon the premise that state power is comprised of legislative, judicial and executive functions, which should be kept separate so that each may act as a check on the others to prevent abuse of governmental powers. Accordingly, each branch of government is concerned with different processes. The legislative process involves the enactment of laws; the judicial process is concerned with the adjudication of disputes; and the executive process is concerned with formulating policy and the administration of the law.

1.10 Legal Institutions and Personnel

As far as the legal system is concerned, the major legal institutions correspond to the processes referred to above. Hong Kong’s legislature is the Legislative Council, which has the power to “enact, amend or repeal laws”, in accordance with the Basic Law and legal procedures. The principal judicial institutions are the courts.

Legislative and judicial institutions and processes must receive special treatment because of their capacity to make law and, therefore, to create new legal relationships. Such institutions are responsible for the two main legal sources of law - legislation made by the legislature and case law that emerges through the process of adjudication. The legal sources of law are outlined in Chapter 3, while the law-making processes are considered in Chapters 5 and 6. The process of adjudication is considered in Chapter 7.

Chapter 1

1.11 The Idea of a Legal System

A system is an entity made up of individual parts that work together as a whole. A legal system is a system of human relationships that are ordered by law.

1.11.1 General elements of a legal system

It is suggested that any legal system will possess the following basic components.

1. Legal rules - legal rules are the contents of the legal system.
2. Institutions - the word “institution” is sometimes used to refer to an established body of rules, as in the institution of contract or the institution of property. Used in this sense it means an area of law that has its own body of settled principles. The word institution is more commonly used, however, to mean organisations with the authority to carry out particular functions of government, as in legislative, judicial and executive institutions.
3. Processes - the mechanisms by which law is made and enforced, and through which disputes are resolved.
4. Personnel - legislators, the judiciary, the legal profession, juries and the police are the people who create, interpret, apply and enforce the law.
5. A set of values and beliefs - in addition to the formal aspects of a legal system, every legal system also stands for a set of values and beliefs, usually referred to as the ideology of the system. This is a difficult idea to grasp, but perhaps the best way to think of it is as a tradition, the peculiar way of doing things reflected in the customs and practices of any community.

1.12 Characteristics of the Common Law Legal System

How is a body of legal doctrine established as a legal system? Broadly speaking, doctrine is either laid down or it evolves over time. Traditionally we distinguish between two types of legal systems - a common law system or a civil law (sometimes called civilian) system.

While this classification is inadequate to include many other legal systems in the world, such as socialist systems and legal orders based upon religion, it is a useful starting-point for thinking about the characteristics of the common law. This is a necessary pre-condition for understanding the role of the common law in Hong Kong, and for contrasting that system with the legal system in the Mainland.



The original common law was the common law of England, which spread to many other nations through the process of colonisation, including Hong Kong. (Other meanings of common law are considered in later chapters).

Without in any way purporting to be exhaustive, the following distinctions may help to develop a general understanding of the nature and spirit of the common law as a system.

1.12.1 Form

The principal formal characteristic of a common law system is that doctrine develops as a by-product of the process of adjudication through which a court determines disputes between the parties before the court. The law that emerges is case law (or decisional law), which acts a precedent for the future (see Chapter 5).

By contrast, in a civil system rules originate from a deliberate act of creation of those rules by a legislature.

1.12.2 Method

Common law develops pragmatically and incrementally on a case-by-case basis, rather than being founded on broad general principles. The common law is a living process that evolves by experience. It is impossible to underestimate the central position of the courts in a common law system. Indeed, one meaning of the common law derives from the traditions and customs of judges, which continue to play an important role in deciding whether case law should be extended or restricted (see Chapter 5).

In theory, the role of the judge in a civil system is to apply the broad principles in codes that have been drawn up by the legislature, and not to make law.

1.12.3 Process

The traditional mode of procedure in common law courts is adversarial in contrast to the inquisitorial procedure employed in civil systems. In an adversarial process, the conduct of the case is in the hands of the litigants. Hearings with witnesses giving oral evidence are the norm. The judge is an unbiased umpire and, in theory, has a very limited role to play.

By contrast, the most noticeable characteristic of an inquisitorial system is the activity of the judge in questioning the defendant and witnesses. As it is part of the judge's function to interrogate, he or she spends much time studying the papers on a case.



1.12.4 Values

The most difficult, but arguably the most important aspect of the common law, is what it stands for. Historically, it was common law judges who determined relationships between individuals and the state, in the process creating legal principles binding as much on the state as on the individual. The role of courts in preventing arbitrary exercises of governmental power is an aspect of the concept of the rule of law. In short, the rule of law means that everyone, including the state and its officials, is subject to the law. It is the rule of law not rule by law.

1.13 Legal Systems Applicable to Hong Kong

At least three systems of law are applicable to Hong Kong:

1. The common law.
2. The law of the People's Republic of China.
3. Chinese custom and customary rights, commonly referred to as Chinese customary law.

The third is of limited importance, and the second is not generally applicable, although as already indicated there are areas of overlap between Mainland law and Hong Kong law. That leaves the common law as the principal system, but it is the Hong Kong common law. What that means is explored in later chapters.

Reflection Exercise

1. With reference to the History Club case, explain the distinction between facts and rules.
2. What are the two main types of legal sources of law in Hong Kong?