# CRIMINAL LAW IN HONG KONG

SECOND EDITION

VICTOR HO WAI-KIN



Wolters Kluwer

# **Criminal Law in Hong Kong**

**Second Edition** 

#### Victor Ho Wai-kin

This book was originally published as a monograph in the International Encyclopaedia of Laws/Criminal Law.

General Editors: Roger Blanpain, Frank Hendrickx Volume Editors: Frank Verbruggen, Vanessa Franssen



Published by: Kluwer Law International B.V. PO Box 316 2400 AH Alphen aan den Rijn The Netherlands

Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by: Wolters Kluwer Legal & Regulatory U.S. 7201 McKinney Circle Frederick, MD 21704 United States of America

Email: customer.service@wolterskluwer.com Sold and distributed in all other countries by: Turpin Distribution Services Ltd.

Stratton Business Park

Pegasus Drive, Biggleswade Bedfordshire SG18 8TQ

United Kingdom

Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper

ISBN 978-90-411-8258-6

e-Book: ISBN 978-90-411-8287-6 web-PDF: ISBN 978-90-411-8303-3

This title is available on www.kluwerlawonline.com

© 2016, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wklawbusiness.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

## The Author



Mr Victor Ho Wai-kin was called to the Hong Kong Bar in 1996 upon completion of his academic and professional legal studies at the University of Hong Kong. He served as Counsel in the Public Prosecutions Division of the Department of Justice for five years before resuming practice at the Criminal Bar in 2004.

Mr Ho also holds a Master Degree in Corporate and Financial Law from the University of Hong Kong and a Postgraduate Diploma in Law from King's College, University of London. He is a frequent speaker at professional seminars on various aspects of criminal law and practice.

The Author	3
List of Abbreviations	13
Preface	15
General Introduction	17
Chapter 1. The General Background of the Country	17
§1. Geography and Climate	17
§2. POPULATION	18
§3. ECONOMY	18
§4. POLITICAL SYSTEM AND ADMINISTRATIVE STRUCTURE	21
§5. SOCIAL AND CULTURAL ASPECTS	24
§6. The Judicial System	25
Chapter 2. Criminal Law, Criminal Justice, and Criminal Science	28
§1. DEFINITIONS OF CRIMINAL LAW I. Criminal Law II. The Concept and Characteristics of Crime III. The Function of Criminal Law IV. Criminal Procedure V. Criminal Offences	28 28 28 30 31 33
§2. OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM I. The Police II. The Prosecution	34 34 36

III. Investigating Jurisdictions IV. Trial Jurisdictions V. Prison and Aftercare VI. The Bar VII. Statistical Overview	37 38 38 40 42
§3. Trends within Criminal Justice	44
Chapter 3. Historical Background	46
§1. THE SOURCE OF THE CRIMINAL LAW	46
§2. THE COMMON LAW ORIGIN  I. The Doctrine of Precedent	46 47
Part I. Substantive Criminal Law	49
Chapter 1. General Principles	49
§1. THE PRINCIPLE OF LEGALITY	49
§2. THE GENERAL NECESSITY OF MENS REA	51
Chapter 2. Scope of Application of Criminal Statutes	53
§1. PRINCIPLES WITH RESPECT TO TIME  I. Non-retroactivity  A. Principles  B. Exceptions  C. Localization and Common Law  D. Extradition  E. Effect of Foreign Adjudication and Execution	53 53 53 54 56 57 58
§2. PRINCIPLES WITH RESPECT TO PERSONS  I. Immunity Based on Municipal Law II. Immunity Based on International Law	60 60 61
Chapter 3. General Principles of Criminal Liability	62
§1. INTRODUCTION: THE BASIC ELEMENT OF CRIMINAL OFFENCES	62
§2. THE ACTUS REUS  I. Omission II. Events III. Causation	62 63 65
Part I. Substantive Criminal Law  Chapter 1. General Principles  §1. The Principle of Legality  §2. The General Necessity of Mens Rea  Chapter 2. Scope of Application of Criminal Statutes  §1. Principles with Respect to Time  I. Non-retroactivity  A. Principles  B. Exceptions  C. Localization and Common Law  D. Extradition  E. Effect of Foreign Adjudication and Execution  §2. Principles with Respect to Persons  I. Immunity Based on Municipal Law  II. Immunity Based on International Law  Chapter 3. General Principles of Criminal Liability  §1. Introduction: The Basic Element of Criminal Offences  §2. The Actus Reus  I. Omission  II. Events	49 49 51 53 53 53 53 54 56 60 61 62 63 63 63 63

§3. MENS REA  I. Intention  II. Negligence  III. Recklessness  IV. Knowledge	67 68 71 73 76
§4. STRICT LIABILITY OFFENCES	79
Chapter 4. Justification, Excuse, and Other Grounds of Impunity	83
§1. General Principles	83
§2. DEFENCES RELATED TO THE MENTAL CONDITION OF THE ACCULAR I. Insanity II. Automatism (Non-insane Automatism) III. Intoxication IV. Diminished Responsibility	USED 83 83 86 86 88
§3. GENERAL DEFENCES  I. Infancy II. Mistake III. Provocation IV. Accident V. Necessity VI. Consent VII. Duress VIII. Public or Private Defence IX. Self-defence X. Superior Orders	91 91 92 94 97 98 100 102 103 104
Chapter 5. Incomplete or Partly Perpetrated Criminal Offences	108
§1. INCITEMENT  I. Actus Reus II. Mens Rea III. Impossibility	108 108 109 109
§2. CRIMINAL LAW OF ATTEMPT  I. Actus Reus II. Mens Rea III. Impossibility IV. Penalties	110 110 111 112 113
§3. AIDING AND ABETTING	114

§4.	Counselling and Procuring	115
§5.	THE CONCEPT OF JOINT ENTERPRISE	116
§6.	PRINCIPAL OFFENDER AND SECONDARY PARTIES	118
§7.	CONSPIRACY I. History and Development II. Mens Rea III. Actus Reus IV. Impossibility V. Penalties	119 119 120 120 122 124
§8.	CONSPIRACY FOR CRIMES OF STRICT AND ABSOLUTE LIABILITY AND SUMMARY OFFENCES	124
Ch	apter 6. Classification and Survey of Criminal Offences	126
§1.	GENERAL CLASSIFICATION OF CRIMINAL OFFENCES  I. Offences Against the State  II. Offences Related to Public Servants  III. Offences Against Public Tranquility	126 127 127 129
§2.	OFFENCES RELATED TO DISHONESTY  I. Offences Under the Theft Ordinance A. Theft B. Obtaining Property by Deception C. Obtaining Pecuniary Advantages by Deception D. Obtaining Services by Deception E. Evasion of Liability by Deception F. False Accounting G. Procuring an Entry into Bank Records by Deception H. Offences Related to Company Directors and Officers of a Company I. Suppression of Documents J. Fraud K. Robbery L. Burglary M. Blackmail N. Handling Stolen Goods	131 131 133 134 135 135 136 137 138 138 139 140 141 142 144
§3.	MISCELLANEOUS OFFENCES  I. Driving Offences A. Dangerous Driving Causing Death B. Dangerous Driving C. Careless Driving D. Driving Under the Influence of Drugs and Alcohol	145 145 145 147 147 148

E. Furious Driving	149
F. Motor Racing	149
II. Nuisance and Miscellaneous Offences	150
III. Offences Related to Drugs	151
IV. Vice Establishment and Related Offences	154
V. Misconduct in Public Office	156
VI. Offences Related to Firearms and Ammunition	158
VII. Offences Related to Offensive Weapons	160
VIII. Piracy	161
IX. Offences Related to the Armed Forces	162
X. Criminal Intimidation	163
XI. Non-fatal Offences	164
XII. Murder	165
XIII. Public Nuisance	168
XIV. False Evidence and Offences Against Public Justice	168
XV. Offences Related to Government Stamps	170
XVI. Offences Related to Forged Documents and Counterfeiting	170
XVII. Offences Related to Crime Proceeds	171
XVIII. Offences Related to the Triads	175
XIX. Offences Related to Marriage	176
XX. Offences Related to Computer Crime	176
XXI. Offences Related to Immigration	179
XXII. Offences Related to Corruption	180
Part II. Criminal Procedure	183
Chapter 1. Principles, Institutions, Stages	183
§1. THE JUDICIAL ORGANIZATION	183
I. Trial Jurisdictions	183
§2. The Stages of the Penal Process	187
I. Summons and Warrants	187
II. The Preliminary Inquiry	189
III. The Prosecution	191
§3. THE LEGAL POSITION OF THE ACCUSED	193
I. Constitutional Rights	193
§4. The Rules of Evidence	195
I. The Principles	195
II. Burden of Proof	197
III. The Means of Proof	198
IV. The Exclusion of Evidence	202
V. Legal Professional Privilege	208

Chapter 2. Powers, Rights, and Duties in the Pre-trial	
Proceedings	210
§1. Power and Duties	210
	210
I. The Power of Arrest	210
II. The Power to Stop and Search	
A. Power of the Police	212
B. Power of ICAC	216
C. Seizure of Property	216
D. Effect of Illegal Arrest and Search	217
III. The Power to Detain	218
IV. Police Interrogations	219
A. Witness Statements	219
B. Admissibility of Statements to the Police	219
V. Other Policing Methods	221
A. Undercover Police Officers	221
B. Informers	222 222
C. Roadblocks	222
D. Video Cameras	
E. Identification Methods	223 224
F. Fingerprints and Photographs	224
G. Intimate Samples and Non-intimate Samples	
H. Covert Surveillance	227
VI. The Power to Release on Bail	227 230
VII. Criminal Disclosure	230
§2. RIGHTS BEFORE TRIAL	232
I. Plea Bargaining	232
Chapter 3. The Inquiry in Court	234
§1. THE LEGAL DOCUMENTATION OF AN OFFENCE	234
I. Charges	234
A. Duplicity	237
B. Amendment of Charge	237
§2. THE TRIAL	240
I. The Course of Trial	240
II. The Admissibility of Cautioned Statements or Videotaped	210
Interviews	244
III. The Presentation of Evidence	246
Chapter 4. Sanctioning System	251
§1. Principles of Sentencing	251
I. Grounds for Increasing Punishment	252

		A. Aggravating Factors	252
	II.	Consecutive and Concurrent Sentences	255
	III.	Totality Principles	257
	IV.	Previous Convictions	258
	V.	Outstanding Offences	259
	VI.	Sivan Procedure	259
	VII.	Sentencing in the Juvenile Courts	260
	VIII.	Enhanced Sentencing	261
		Grounds for a Reduction in Sentence	265
		Grounds for Mitigation in Sentencing	266
	XI.	Long-Term Prison Sentences Review Ordinance	268
§2.	THE PEN	NALTIES	269
	I.	Death Penalty	269
	II.	Life Imprisonment	270
	III.	Absolute Discharge	271
		Fine	272
		Binding-Over Order	274
		Police Superintendent's Discretion Scheme	275
		Reformative Training	276
		Detention and Training Centre Order	276
		Probation Order	279
		Community Service Order	280
		Compensation Order	281
		Forfeiture Order	282
		Disqualification	283 285
		Criminal Bankruptcy Order	286
		Drugs Addiction Treatment Centre	286
	AVI.	Suspended Sentence	200
§3.	THE LE	GAL REMEDIES	286
	I.	Introduction	286
	II.	Appeal	287
		A. Appeal from the District Court and CFI against Conviction	287
		B. Appeal from the District Court and CFI against Sentence	291
		C. Appeal from Magistracy against Conviction	291
		D. Appeal from Magistracy against Sentence	292
		E. Right of Appeal to the Highest Appellate Court from	
		Magistracy Appeal	293
	III.	Review	294
		A. Review of a Decision by a Magistrate	294
		B. Secretary for Justice's Review against Sentence	294
	** *	C. Application for Review of a Bail Decision	295
		Reference by the Chief Executive	295
		Appeal by Way of Case Stated	296
	V1.	Reference to the Court of Appeal on a Question of Law	207
		Following Acquittal	297

VII. Appeal in Relation to Costs VIII. Judicial Review	297 299
IX. Miscellaneous Appeal	299
X. Criminal Jurisdiction of the Court of Final Appeal	300
XI. Criminal Jurisdiction of the Court of Appeal	301
Part III. Execution and Extinction of Criminal Sanctions	303
Chapter 1. The Prison System	303
§1. Organizational Structure	303
I. Classification of Prisoners	304
§2. THE PENITENTIARY REGIME	304
I. Aspects of Living Conditions	304
A. Prison Labour	304
B. Religious Services C. Letters and Visits	304
D. Information and Media	304 306
E. Disciplinary Measures	306
§3. Prisoners' Rights, Complaints Procedure, and Judicial	
CONTROL	307
Chapter 2. Extinction of Sanctions or Sentences	309
§1. Chief Executive's Pardon	309
General Conclusion	311
Selected Bibliography	313
Index	315

# **Criminal Law in Hong Kong**

**Second Edition** 

#### Victor Ho Wai-kin

This book was originally published as a monograph in the International Encyclopaedia of Laws/Criminal Law.

General Editors: Roger Blanpain, Frank Hendrickx Volume Editors: Frank Verbruggen, Vanessa Franssen



## The Author



Mr Victor Ho Wai-kin was called to the Hong Kong Bar in 1996 upon completion of his academic and professional legal studies at the University of Hong Kong. He served as Counsel in the Public Prosecutions Division of the Department of Justice for five years before resuming practice at the Criminal Bar in 2004.

Mr Ho also holds a Master Degree in Corporate and Financial Law from the University of Hong Kong and a Postgraduate Diploma in Law from King's College, University of London. He is a frequent speaker at professional seminars on various aspects of criminal law and practice.

The Author

The Author	3
List of Abbreviations	13
Preface	15
General Introduction	17
Chapter 1. The General Background of the Country	17
§1. Geography and Climate	17
§2. POPULATION	18
§3. ECONOMY	18
§4. POLITICAL SYSTEM AND ADMINISTRATIVE STRUCTURE	21
§5. SOCIAL AND CULTURAL ASPECTS	24
§6. The Judicial System	25
Chapter 2. Criminal Law, Criminal Justice, and Criminal Science	28
§1. DEFINITIONS OF CRIMINAL LAW I. Criminal Law II. The Concept and Characteristics of Crime III. The Function of Criminal Law IV. Criminal Procedure V. Criminal Offences	28 28 28 30 31 33
§2. OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM  I. The Police II. The Prosecution	34 34 36