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Hong Kong Constitutional Law Notes & Model Exams

1st Edition
For use with
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1. INTRODUCTION

A. HOW TO USE CONVERSION NOTES

The Hong Kong Constitutional Law Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied. You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative answer!

B. ABBREVIATIONS

The Hong Kong Constitutional Law Notes will refer frequently to the following using abbreviations.

Chief Executive	CE
Basic Law	BL
National People's Congress Standing Committee	NPCSC
1984 Sino-British Joint Declaration	JD
Sino-British Joint Liaison Group	JLG
Central Authority	CA
Central People's Government	CPG
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Labour Conventions	ILO
Bill of Rights Ordinance	BOR



2. ACQUISITION OF BRITISH SOVEREIGNTY

A. BASIS OF BRITISH JURISDICTION IN HK, THE ASSUMPTION AND EXERCISE OF BRITISH AUTHORITY

- 1841- Captain Elliot's 2 proclamations that HK Island is part of the Queen's dominions by clear public agreement between China and Britain. While all British subjects and foreigners in HK were to be governed according to British law, natives of China were to be governed according to the laws and customs of China.
- 1842- Treaty of Nanking (Article 3) – HK Island was ceded to Britain.
- 1843 – Royal Charter/ Letters Patent – proclaimed HK as a British colony and empowered Governor, "with the advice" of the Legislative Council, to make laws. This legislature first provided for the wholesale reception of English law through the Supreme Court Ordinance (1844).
- During the second opium war – Britain negotiated a lease over Kowloon in return for an annual rent
- 1860- Convention of Peking (Article 6) – after the second opium war, Kowloon lease converted into a cession
 - Queen Victoria issued an Order in Council – made Kowloon part of the colony of HK
- Supreme Court Ordinance 1873 - Provided that the laws as existed on 1843 shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the colony and except so far as they have been modified by laws passed by the said legislature. (Section 5)
- 1898 Second Convention of Peking – NT leased to Britain for 99 years until 1 July 1997.
 - China allowed to continue to station Chinese officials and exercise jurisdiction in Walled City of Kowloon "except so far as they may be inconsistent with the military requirements for the defence of Hong Kong"
- 1898 - "NT Order in Council"
 - Art 1 – NT became part of colony of HK as if they had originally formed part of the Colony
 - Art 2 – Governor, with the advice and consent of the LegCo, could make laws
- 1899- "Kowloon City Order in Council"
 - British made the Walled City of Kowloon part of the colony of HK. Britain did not demolish and redevelop Walled City until after signing Sino-British JD 1984, when China finally recognized British jurisdiction over all of HK until 1 July 1997.
 - The Orders in Council provided the legal basis for the exercise of British authority in HK until 1 July 1997. The Kowloon City Order in Council and the NT Order in Council, "being clear manifestations of the (Royal) prerogative, are acts of State binding on this court as conclusive declarations of the jurisdiction conferred thereupon". (*Re Wong Hon* (1959))
- 1966- The Application of English Law Ordinance provides that 'The common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of HK or its inhabitants and subject to such modifications thereto as such circumstances may require.' (section 3)
- The BL (Article 8) provides that "The laws previously in force in HK, that is, the common law, equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR."

B. THE UNEQUAL TREATIES

- Vienna Convention on the Law of Treaties 1969 (Article 52) – treaty void if procured by the threat or use of force in violation of principles of international law. However, the Convention doesn't operate retrospectively
- China adopts broader view of what is an unequal treaty – Jilin People's Publishing Corporation Dictionary in 1991 described it as those "concluded by the coercion of one party through unjust methods with the aim of imposing unequal obligations on the other party"
 - 1842 Treaty of Nanking and 1860 Convention of Peking - Unequal treaties, forced upon China through use of force
 - 1898 Second Convention - Not obtained through use or threat of force, but force was implicit
- Chinese position is that all treaties China signed before the establishment of the PRC are unequal and void in international law – this is based on principles of international law which pre-date the Vienna Convention. So as a matter of law, China never recognised British sovereignty over HK until JD was signed in 1984.

C. THE COLONIAL CONSTITUTION AND THE SYSTEM OF GOVERNMENT

- HK had a written constitution previously, consisting of Letters Patent and Royal Instructions
- Previously there was no separation of powers, no system of checks and balances.
- In theory, the Governor was all powerful. The CE also has similar powers under the BL.



- Article 6 of Letters Patent provides for existence of Legislative Council, but under Article 7 the Governor makes laws “with the advice and consent of the Legislative Council”
- Article 10 of Letters Patent – Governor power to refuse to assent to any law passed by LegCo
 - CE’s power under BL to refuse to pass a law, but power can be overridden by two-thirds majority in LegCo (Articles 49-52 BL)
- Article 28A of Letters Patent – Governor unrestricted power to dissolve LegCo at any time
 - CE has a more restricted power under BL – can only be exercised once during CE’s 5 year term, in some circumstances can lead to CE being forced to resign (Articles 50, 52 BL)
- Article 4 of Letters Patent provided for existence of Executive Council that offered advice to Governor, but Clause 12 of Royal Instructions allowed him to reject advice at any time, subject only to requirement to report rejection to British Government
 - CE has similar power under Art 56(3) BL – reject advice of Executive Council providing a specific reason is put on record
- Article 14(1) of Letters Patent – Governor has unrestricted power to appoint judges and other public officers
 - CE has more restricted power to appoint judges under Article 88 BL – can only appoint on the recommendation of an independent commission
- Article 18 of Letters Patent – general requirement for everyone in HK to obey Governor’s instructions

D. HUMAN RIGHTS IN THE COLONIAL CONSTITUTION

- Traditionally, human rights protected through common law system and values (e.g. habeas corpus)
- Prior to 1991, only one provision in Letters Patent mentioned human rights, and only in the context of making it more difficult to pass laws discriminating against those not of European birth
- Situation changed in 1991 when BOR Ordinance was enacted
 - Incorporated most rights contained in International Covenant on Civil and Political Rights
 - Letters Patent amended to add a new Article 7(5) referring to the ICCPR

E. POLITICAL REFORM IN THE 1950S

- Britain was initially concerned with designing a constitution for HK which maintained a wide measure of flexibility as local issues were subordinated to imperial interests.
- As the economy developed, the powers of the Governor to nominate private citizens to governmental bodies became invaluable as an increasing alliance was being established between the administration and the growing business community.
- Social and economic developments after the 1950s led to the growth of a labour class and other groups which sought to have its interests represented in governmental bodies. This led to the social disturbances of the 1960s which stimulated the reforms at the local and district level of government.

F. DEVELOPMENT OF THE ADMINISTRATIVE SYSTEM

- The reforms led to a system of government by consensus and consultation through considerable public participation in administration. However there was still a very close alliance between the administration and various business and professional elites.
- Discontent has been triggered by the failure of the constitutional order to accommodate the interests and needs of those outside the traditional business elites.

G. DEVELOPMENT OF REPRESENTATIVE GOVERNMENT

- Initially – LegCo, ExCo consisted entirely of government officials chosen by Governor



We hope you have enjoyed this short preview of the Hong Kong Constitutional Law Notes & Model Exam Answers.

Don't forget to check out the Law Study Tips we have on our website at www.PCLLConversion.com!