



PCLL Conversion Notes
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Hong Kong Constitutional Law Notes

2018
1st Edition



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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 and unconventional answer!

2. ACQUISITION OF BRITISH SOVEREIGNTY

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

- 1841 Captain Elliot's 1st and 2nd proclamation– HK island part of Queen's dominions by clear public agreement between China and Britain
 - Government was to devolve upon the Chief Superintendent
 - Natives of China were to be governed according to the laws and customs of China
 - All British subjects and foreigners in HK were to enjoy full security and protection according to the principles and practice of 'British law'.
 - Most Chinese law quickly replaced but some remained (E.g. s13 of NT Ordinance gives recognition to Chinese customary rights affecting NT land).
- **1842** Treaty of Nanking – after 1st opium war, **HK island** ceded to Britain (Article 3)
- 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) but had a large number of defects.
- During 2nd opium war – Britain negotiated a lease over **Kowloon** in return for an annual rent
- **1860** Convention of Peking – after 2nd opium war, lease converted into a cession (Article 6)
 - Queen Victoria issued an Order in Council – made Kowloon part of the colony of HK



- **Supreme Crt 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 – business interests lobbied for extension of colony, thus **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”
 - Protected **residents of NT** from being expelled or having their land expropriated – provided that if land required for public purposes, shall be bought at a fair price. However, the court enforced the local legislation which had breached the terms on the ground that, according to the common law, breaches of treaties were not justiciable in municipal courts (*Winfat Enterprise*)
- 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 Legis Council, could make laws
 - Although NT Order in Council only applied for the 99 year term of the lease, during that period it treated NT as “part and parcel of her Majesty’s Colony of HK” – ie no distinction between HK Island and Kowloon which had been ceded to Britain in perpetuity under earlier treaties, and the NT which had only been leased to Britain for 99 years
 - In effect, Britain treated NT not as having been leased but rather as having been ceded for 99 years
 - But a cession is by definition a transfer of sovereignty in perpetuity
 - But attempts to argue in HK courts that Britain had broken terms of the 1898 Convention were unsuccessful – Convention was an international treaty hence not directly enforceable in the courts under HK or British law
 - *Winfat Enterprises (HK) Co Ltd v Atroney-General* (1985)
 - Gov decision to resumed plot of land in NT challenged on ground that 1898 Convention protected NT residents against any ‘expropriation’ of land
 - Challenge rejected partly on grounds that NT Order in Council gave Britain full jurisdiction over the NT without restrictions
 - This is because a well established aspect of imperial law is that the Crown is not bound by its treaty undertakings in respect of jurisdiction in ceded territories.
- 1899- “Kowloon City Order in Council”
 - British expel Chinese officials on that ground and made the Walled City of Kowloon part of the colony of HK.
 - China never accepted expulsion. Even British law officers privately warned that Britain might have violated terms of Convention. Thus Britain never took issue of jurisdiction over Walled City of Kowloon to international arbitration. Britain careful not to 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 97



- As far as HK courts were concerned, the Orders in Council provided the legal basis for the exercise of British authority in HK until 1 July 1997
 - *Re Wong Hon* (1959)
 - Lawyers for Chinese national accused of committing a murder inside the Walled City of Kowloon applied for a writ of habeas corpus on grounds that the Walled City was outside the jurisdiction of the British colony of HK
 - Argument dismissed in crt – “Kowloon City Order in Council” extended British jurisdiction to the Walled City of Kowloon
 - 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”
- 1966- The Application of English Law Ordinance deleted the date of reception thereby officially allowing post-1843 English decisions to be binding in the colony.
 - ‘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, which is to be the primary document for the SAR, provides in Article 8 that:
 - “The laws previously in force in HK, that is, the common law, equity, ordinances, subord leg and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the HKSAR.”
 - Although English law and Acts of Parliament are not mentioned, it will continue if the common law remains defined as that of England and if provisions granting the practice and procedure, powers, or jurisdiction of English courts are maintained. Insofar as it is still necessary to defined portions of the common law in terms of the law of England as at the cut-off date, the effect of some Acts of Parliament will persist.
 - It therefore cannot be assumed that the reception of English law is a strictly colonial phenomenon which cannot survive the change of sovereignty in 1997.

ii. 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 violence of principles of international law
 - But Convention doesn’t operate retrospectively
- **China** adopts **broader view of what’s 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”



We hope you have enjoyed this short preview of the Hong Kong Constitutional Law Notes. Don’t forget to check out the Study Tips we have on our website at www.PCLLConversion.com!