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Hong Kong Legal System Notes

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TABLE OF CONTENTS

1. INTRODUCTION	4
A. How to use Conversion Notes.....	4
2. DEVELOPMENT OF THE HONG KONG LEGAL SYSTEM (1842-1997)	4
A. Background.....	4
B. Reunification Ordinance 1997	6
3. SOURCES OF HONG KONG LAW.....	6
A. Law Previously in Force Art.8	6
B. Special position in New Territories land	7
C. Imperial enactments.....	7
D. Prerogative power	8
E. Legislation and restriction on law making powers	8
F. National laws.....	9
i. Relationship between the BL and Other National Laws	9
G. State of Emergency under Art 18(4) – NPC can effectively restrict all rights?...	9
H. Restrictions under Art 23 (國家安全).....	10
I. NPCSC’s interpretation.....	11
J. PRC Constitution v Basic Law - HK law made by HK people essay	12
4. DOCTRINE OF STARE DECISIS	12
5. HONG KONG COURT SYSTEM.....	13
A. Hierarchy of courts.....	13
i. Magistrate Courts	13
ii. District Courts.....	13
iii. Court of First Instance (Part of HC).....	13
iv. Court of Appeal (Part of HC)	13
v. Court of Final Appeal.....	14
B. Role of the CFA.....	14
i. Development of its own common law	14
ii. Upholding the rule of law.....	14
iii. Protecting the High degree of autonomy.....	15
iv. Enforcing human rights – protecting civil liberties.....	15
C. Jurisdiction and its constitutional limits.....	15
i. Article 19:	15
ii. Continuity of previous restrictions.....	15
iii. NPCSC’s ultimate power of Interpretation – General Restriction	16
iv. How wide is the effect of the phrase “judgements previously rendered shall not be affected”?	16
v. Can the CFA review mainland legislation? Art. 19(2).....	16
D. Jurisdiction over Acts of State under Article 19(3) - Essay.....	17
E. Judicial Independence under the Basic Law- Essay.....	17
F. Judicial Immunity and judicial accountability	17
i. Prior to 1 July 1997.....	17
ii. What is the scope of the immunity after 1 July 1997?.....	17
iii. Judicial Accountability.....	18
6. THE COMMON LAW SYSTEM AND THE PRC LEGAL SYSTEM: A COMPARATIVE OVERVIEW.....	18



A. Meaning of Sovereignty.....	18
B. How the NPC interprets laws	19
C. Interpretation approach in HK – Common Law interpretation	20
D. Conflicts in Interpretation.....	21
7. INTERFACE BETWEEN THE TWO SYSTEMS- RENDITION	22
A. Basic Law and Constitutional Review: The First Decade (by Johannes Chan 2007)	22
i. Reception of International and Comparative Jurisprudence.....	22
ii. Politicising the Courts	23
iii. Challenge on the Provisional Legislature	23
iv. Falun Gong’s demonstration was charged	23
v. Conclusion	23
B. The Intersection of Chinese Law and the Common Law in HKSAR: Question of Technique or Politics? (by Yash Ghai 2007)	23
i. Political Economy.....	23
ii. The Context of the Common Law	24
iii. The Common Law in the Basic Law	24
iv. The Interface	24
v. Constitutional jurisdiction of Hong Kong Courts.....	25
vi. Conclusion	25
8. INTRODUCTION TO LEGAL RESEARCH: SOURCES AND SKILLS	25
A. Statutory Interpretation in HK	25
B. Use of Extrinsic Materials.....	25



1. INTRODUCTION

A. HOW TO USE CONVERSION NOTES

The Hong Kong Legal System 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. DEVELOPMENT OF THE HONG KONG LEGAL SYSTEM (1842-1997)

A. BACKGROUND

- 1841 Captain Elliot's Proclamations– HK island part of Queen's dominions
 - Dual prospective of law in the Colony- Chinese governed by Chinese law. British subjects and foreigners governed by 'British law'.
- 1843 after Treaty of Nanking – **Royal Charter (Letters Patent)** – proclaimed HK as a British colony and empowered Governor to make laws.
- 1861 after Convention of Peking ceding Kowloon –Order in Council – made Kowloon part of the colony of HK
- **Supreme Crt Ordinance 1873**
 - 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)
 - In practice cut off date applied for statutes only
- 1898 after Second Convention of Peking leasing NT to Britain for 99 years
- 1899 after Chinese officials expelled from Walled City of Kowloon
- 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)



- com law imported into HK can be affected by legislation made as part of law of England which does not apply to HK, provided that such legislation was formerly in force here under the old formula—therefore the cut off date is still relevant (all statutes part of English law on the date. S3 only applies to English legislation passed after the date or to earlier legislation never in force in HK)
- com law and equity only in force in HK to the extent of their applicability to circumstances of HK- Strict test- inapplicable to HK only if cause injustice or oppression
- s4 - reception in HK of prerogative legislation and Acts of UK parliament. Import English legislation by act or order in council by its own terms, local ordinance, incorporation of pre-1843 statute into the schedule to application of English law ordinance
- In effect split law into 2 types- enactments, and common law and equity
- 1984 **Sino-British Joint Declaration** - China formally accepted that Britain was responsible for the administration of HK until 1 July 97. Art 3- 12 basic principles:
 - The HK SAR gov will be composed of local inhabitants.
 - Judicial power, to be exercised independently, shall be vested in the SAR courts, and these courts shall possess the power of final adjudication
 - A prosecuting authority shall control criminal prosecutions free from any interference.
 - The laws previously in force, other than those made in the UK but including common law and equity, shall be maintained unless they contravene the BL
 - The rights and freedoms of inhabitants shall be protected.
 - The social and economic systems in HK and the life style of inhabitants will remain unchanged.
 - Basic policies will remain unchanged for at least 50 years
- But since the **JD is an intl treaty, it's not part of HK law and doesn't in itself confer rights enforceable under HK law**
 - Nonetheless, Crt of Final Appeal recognised that the **JD could be used to interpret provisions in the Basic Law** (*Ng Ka Ling v Director of Immigration* (1999)) – **preamble of Basic Law** states that its **purpose is to implement the PRC's 12 Basic Policies regarding HK**, Art 159 Basic Law also prevents it being amended in any way that contravenes these Basic Policies
 - Crts shown readiness to attach weight to Basic Policies when interpreting Basic Law – *Gurung Kesh Bahadur v Director of Immigration* (2001) – held that freedom of travel was a basic policy laid down by the JD, thus upheld challenge to Immi Dpt's decision which was contrary to Art 31
- The Basic Law, which is to be the new constitution 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.
- **Professor Li Shaomin**- Convicted of treason on the mainland- deported to US- return to hk, hailed as a victory for HK's autonomy within China. Experts said the decision to admit Mr. Li was probably made by the Chinese government rather than local authorities -- and on political rather than legal grounds.



- Previously under British rule, Han Dongfang, a labor advocate who was imprisoned in China for his involvement in the democracy movement, was deported to Hong Kong in 1993 and still lives in the territory.

B. REUNIFICATION ORDINANCE 1997

To confirm the Bills passed by the Provisional Legislative Council before 1 July 1997, endorse the appointment of judges of the Court of Final Appeal and the Chief Judge of the High Court, assist the interpretation on and after 1 July 1997 of laws previously in force in Hong Kong, continue those laws and confirm certain other laws, establish the High Court, the District Court, magistracies and other courts, tribunals and boards, continue legal proceedings, the criminal justice system, the administration of justice and the course of public justice on and after 1 July 1997, continue the public service on and after 1 July 1997, assist the construction of certain documents on and after 1 July 1997, transfer the ownership of certain property and rights and provide for the assumption of certain liabilities on and after 1 July 1997, in consequence of the resumption of the exercise of sovereignty over Hong Kong by the People's Republic of China, and for connected purposes.

3. SOURCES OF HONG KONG LAW

- The principal source of law in the SAR is the BL. All laws must be in accordance with its provisions, both in terms of new law as well as that which has been carried over after the changeover. Art.18 shows that the sources of law for HK :
 - Basic Law (art.11)
 - Laws previously in force as stipulated in Article 8
 - Laws enacted by the SAR
 - Laws enacted by the NPC or NPCSC which relate to defence and foreign affairs and otherwise as stated in Art. 18
 - Note NPCSC has the final right to interpret (art 158)

A. LAW PREVIOUSLY IN FORCE ART.8

- Prior to the changeover, the Joint Liaison Group determine those laws that were in contravention of the BL. Case law relevant to these legislation and any other decisions concerning other laws which have not been adopted by the SAR also ceased to have any effect on July 1997.
- Common Law & Equity
 - it is open to the HKSAR to regard only the pre-transfer decisions of the Privy Council and the (House of Lords- query) as binding, but with the right of the CFA to depart from them if it considers hem wrong. English likely to *remain influential* in future. Much of the common law continues to apply in HK, including most of the cases which interpreted and applied the many ordinances before the changeover which remain in force.



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