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Hong Kong Constitutional Law Notes & Model Exams

1st Edition
For use with
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TABLE OF CONTENTS

1. INTRODUCTION.....	5
A. How to use Conversion Notes.....	5
B. Abbreviations.....	5
2. ACQUISITION OF BRITISH SOVEREIGNTY.....	6
A. Basis of British Jurisdiction in HK, the Assumption and Exercise of British Authority.....	6
B. The Unequal Treaties.....	6
C. The Colonial Constitution and the System of Government.....	6
D. Human rights in the colonial constitution.....	7
E. Political Reform in the 1950s.....	7
F. Development of the Administrative System.....	7
G. Development of Representative government.....	7
3. RESUMPTION OF SOVEREIGNTY.....	8
A. Introduction.....	8
B. Sovereignty and Self-Determination.....	8
i. China's position on self-determination.....	8
ii. Self-determination and the United Nations.....	8
C. Sino-British Negotiation and the JD in 1984.....	8
D. Drafting of the HK Basic Law (BL).....	9
E. Residual powers.....	9
F. Scope of Application of the Chinese Constitution.....	9
G. Structure of the HK Basic Law.....	10
H. Transitional Issues.....	10
I. Patten's Political Reforms in the 1990s – LegCo.....	11
J. Breakdown of the Through Train model.....	11
K. Provisional Legislative Council and its Legality.....	11
4. FRAMEWORK OF THE HONG KONG BASIC LAW.....	12
A. Models of Autonomy.....	12
B. Nature and Scope of Autonomy (as per the Joint Declaration).....	12
C. Nature and Scope of Autonomy (as per the Basic Law).....	13
D. The Distinct Nature of the Basic Law.....	14
E. Objectives of Basic Law - General Principles.....	14
F. Duration of HKSAR – 50 years?.....	14
G. Relationship between Central Government and the HKSAR.....	14
i. As per the Joint Declaration.....	15
ii. As per the Basic Law.....	15
iii. Other powers of the HKSAR and NPC.....	15
iv. Some Contentious Issues in the balance of power.....	15
v. Status of Residual Power: which entity owns power not expressly dealt with?.....	16
5. THE POLITICAL AND ADMINISTRATIVE SYSTEM.....	16
A. The Political Structure - Introduction.....	16
i. China's Point of View.....	16
ii. British Ruling in the Past.....	16
B. Basic Principles – The Franchise.....	16
i. General Rights in Franchise.....	16
ii. Bill Of Rights Ordinance.....	16
iii. ICCPR.....	16
iv. Functional Constituency.....	17
C. Forms of Representation.....	17
i. Election to the National People's Congress (NPC).....	17
ii. Election/appointment of the Chief Executive.....	17



iii. Election to Leg Co	17
D. Centralized and Consultative Government.....	17
E. Separation of Powers or Executive-led Government?.....	17
i. Judiciary.....	17
ii. Check and Balances in Basic Law.....	18
F. The Rule of Law.....	18
G. Election of the Legislative Council – Composition - Functional Constituencies.....	18
i. President of the Legislative Council	18
ii. Elections	18
iii. Changing the method for electing LegCo.....	19
H. Break down of ‘through train model’ and the formation of the Provisional LegCo	19
I. Legislative Council – Powers and Functions.....	19
J. Law making process (separation of powers – legislature vs executive)	20
i. Legislature vs Executive (checks and balances).....	20
K. Supervision of Executive and Parliamentary Enquiry.....	20
L. Public Finance (method for legislature to ‘check’ executive action).....	21
M. Executive Government of the HKSAR and the Chief Executive in Council.....	21
i. Public Service	21
N. The Chief Executive.....	21
O. Changes to method for selecting the Chief Executive	22
P. Impeachment of the Chief Executive	22
Q. Objective of the Political System.....	23
R. Contradictions in the Political System.....	23
i. Argument that HK’s political system is dysfunctional, perhaps because of the separation of powers between legislative and executive.....	23
ii. Argument that concerns about the executive government’s weakness is exaggerated.....	23
iii. “Slowing Down” VS “Political development”	23
iv. “Business Community” VS “CA”	23
v. “Executive-led government”	23
vi. China Intervention.....	24
vii. Xinhua	24
S. Neutrality of the Civil Service and the Ministerial System.....	24
T. Language of the Legal System	25
U. Relationship with Chinese Legal System	25
6. CONSTITUTIONAL JURISDICTION OF THE COURTS OF THE HKSAR.....	25
A. Parliamentary sovereignty and its application to the HKSAR – judicial review.....	25
B. Acts of State and Facts of State	27
i. Acts of State.....	27
ii. Acts of States.....	27
iii. Scope of ‘acts of state’ under the Basic Law.....	27
C. Judicial Review of HKSAR Legislation.....	27
i. Argument that HK courts have no power to review HKSAR legislation	27
ii. Argument that HK courts have power to review HKSAR legislation.....	28
iii. Judicial Review: Power to review laws and policies for conformity with Basic Law (Art.80)	28
1) What are the limitations on Court’s power to judge?.....	28
2) Judicial Immunity	28
D. Resolutions of the NPCSC.....	29
7. INTERPRETATION AND AMENDMENT OF THE BASIC LAW	29
A. Scheme of Amendments to the Basic Law	29
B. The importance of Interpretation and Mode of interpretation	30
i. Situation 1: Dealing with inconsistency of Basic Law with previous law (Art. 158).....	30
ii. Situation 2: Returning of Law passed by HKSAR Legislature (Art.17).....	30
iii. Situation 3: Application of national Law in HKSAR.....	30



iv.	Situation 4: Amendment of Basic Law.....	30
v.	Situation 5: In the course of litigation.....	31
C.	Scheme for interpretation under Art 158.....	31
i.	NPCSC's Powers of interpretation under the Basic Law.....	31
D.	Seeking interpretation from NPC – Judicial referral, classification test, and necessity test.....	31
i.	Ng Ka Ling v Director of Immigration [1999] 1 HKC 291	31
ii.	The Director Of Immigration v. Chong Fung Yuen [2001] HKCFA 48.....	32
iii.	Tam Nga Yin v Director of Immigration [2001] HKCFA 53.....	32
iv.	Democratic Republic Of The Congo v. FG Hemisphere Associates LLC [2011] HKCFA 41.....	33
v.	Vallejos & Anor v Commissioner of Registration & Anor- [2013] 4 HKC 239.....	33
E.	Problems arising under Art 158.....	34
i.	Difficulty 1: Availability of two traditions for interpretation.....	34
ii.	Difficulty 2: Applicability of PRC constitution in HK and its relationship with Basic Law.....	35
iii.	Difficulty 3: Relationship between the Basic Law and Other National Laws	35
iv.	Difficulty 4: Influence of Foreign Treaties	35
F.	Legislative interpretation vs Judicial interpretation	35
G.	Judgment previously rendered shall not be affected.....	35
H.	Role of the Basic Law Committee.....	36
I.	Principles of and Approach to interpretation.....	36
8.	RIGHTS AND FREEDOMS	37
A.	General Framework for the Protection of Rights and Freedoms	37
B.	Chapter 3 of the Basic Law	37
C.	BOR, ICCPR, ICESCR and ILO.....	37
i.	International Sources of Rights (implemented through Art.39).....	37
ii.	The Legal Basis for Application of These Treaties (Art.39)	38
iii.	Domestic Sources of Rights.....	38
D.	Is the Bill of Rights Ordinance compatible with the Basic Law?	39
E.	Civil and Political Rights.....	39
i.	Freedom of Association	39
F.	Economic rights and property rights.....	40
G.	Social and cultural rights and policies.....	40
H.	Lawful traditional rights & interests of the NT Indigenous Inhabitants.....	40
I.	Limitations or restrictions on rights and freedoms.....	40
i.	Rights in Basic Law which are listed in ICCPR.....	41
ii.	Rights in Basic Law only and are not listed in ICCPR (Gurung Kesh Bahadur v Immigration 2001).....	42
J.	State of Emergency under Art 18(4) – NPC can effectively restrict all rights?	42
K.	Restrictions under Art 23 and the National Security Law	42
i.	Relationship between Art.23 and Art.39.....	42
ii.	National Security Law (under Annex III of the BL).....	42
1)	Relevant Articles under the National Security Law.....	43
9.	INTERNATIONAL ASPECTS OF THE HKSAR	45
A.	Chinese view of International Law	45
B.	External Affairs power of the HKSAR - Foreign affairs vs external affairs.....	45
i.	Scope of authority under Art 151 unclear, 'appropriate fields' not defined – look at Basic Law	45
ii.	External affairs- different aspects of autonomy of HK.....	46
C.	Role and problems of HKSAR in international legal regime.....	46
i.	Problem 1: Scope of external affairs powers- Difficult to determine:.....	46
ii.	Problem 2: lack of measures for resolving conflicts of power.....	46
iii.	Problem 3: Legal effect of treaties.....	46
iv.	Problem 4: HK's status in PRC treaties.....	46
v.	Problem 5: Membership in international organizations.....	46
D.	Succession of rights and obligations in international treaties applicable to HK before 1997.....	46
10.	CONSTITUTIONAL SYSTEM OF THE PRC.....	47



A. Theory of socialist constitution.....	47
i. Comparison of Liberal and Socialist Theories	47
B. Brief history of Chinese constitutional system.....	47
C. The PRC constitution.....	47
i. The Economic System of the PRC	47
ii. The Political System of the PRC.....	48
D. Central Authorities of the PRC (NPC, NPCSC, State Council, Central Military Commission)	48
i. NPC.....	48
ii. NPCSC	48
iii. State Council (The Government of the PRC).....	48
iv. Central Military Commission (direct armed forces)	49
E. Role and Organisation of the Communist Party.....	49
F. SARs under Art 31	49
G. Rights and Obligations of the Citizen.....	49
H. Sources of Law (Legislative Interpretation, Judicial Interpretation and Executive Interpretation)	49
I. The judiciary, the Public Security Bureau & the Procuratorate.....	50
J. Review of the Judiciary.....	50
K. A Developing Constitution	50

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!