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Hong Kong Legal System Notes & Model Exams

1st Edition
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TABLE OF CONTENTS

1. INTRODUCTION	5
A. How to use Conversion Notes	5
B. Abbreviations	5
2. DEVELOPMENT OF THE HONG KONG LEGAL SYSTEM (1842-1997)	6
A. Background	6
i. Supreme Court Ordinance 1873	6
ii. The Application of English Law Ordinance 1966	6
iii. Sino-British Joint Declaration 1984	7
1) Interpretive value	7
iv. Basic Law	7
3. SOURCES OF HONG KONG LAW	8
A. Law Previously in Force (Article 8)	8
i. Common Law & Equity	8
ii. Legislation	8
iii. Customary Law	8
B. Special position in New Territories land	9
C. Imperial enactments and prerogative power	9
D. Legislation and restriction on law making powers	9
i. Restrictions	10
ii. NPC powers to return a new enactment	10
iii. Ambit of law making powers	10
1) National laws	10
2) External affairs	10
E. National laws	11
i. Relationship between the BL and Other National Laws	11
ii. Additions or deletions of national laws	11
iii. Supremacy of Basic Law?	11
iv. <i>Cheung Lai Wah</i>	11
1) Facts	11
2) Arguments	11
3) Held	12
F. State of Emergency under Article 18(4)	12
i. Bill Of Rights Ordinance	12
1) Test	12
ii. Basic Law article 18	12
1) Test	12
iii. Restriction of freedom	12
1) ICCPR	13
G. Restrictions under Article 23 and the National Security Law	13
i. Implementation	13
ii. 'One country, two systems'	13
iii. Safeguarding National Security Ordinance	14
iv. National Security Law (under Annex III of the BL)	14
1) Relevant Articles under the National Security Law	15
H. NPCSC's interpretative power	17
i. <i>Ng Ka Ling (1999)</i>	18
1) Test	18



2) Held	18
ii. Criticism of <i>Ng Ka Ling</i>	18
iii. <i>Lau Kong Yung</i> (1999)	19
iv. <i>Chong Fung Yuen</i> (2001)	19
1) Substantial effect test	19
2) Held	19
v. Present position	19
I. PRC Constitution	20
4. DOCTRINE OF STARE DECISIS	20
A. Decisions of the Privy Council	20
B. Decisions of the House of Lords	20
C. Branching out	20
D. Role of the CFA	21
E. Statutory Interpretation in HK	21
F. Use of Extrinsic Materials	21
5. HONG KONG COURT SYSTEM	22
A. Hierarchy of courts	22
i. Magistrate Courts	22
1) Stare Decisis	22
ii. District Courts	22
1) Stare Decisis	22
iii. Court of First Instance (Part of the High Court)	22
1) Stare Decisis	22
iv. Court of Appeal (Part of the High Court)	22
1) Stare Decisis	22
v. Court of Final Appeal	23
1) Stare Decisis	23
B. Role of the CFA	24
i. Development of its own common law	24
ii. Upholding the rule of law	24
iii. Protecting the High degree of autonomy and enforcing human rights	24
C. Jurisdiction and its constitutional limits	25
i. Jurisdiction of the Region under Article 19 BL	25
ii. Continuity of previous restrictions	25
iii. NPCSC's ultimate power of Interpretation – General Restriction	25
iv. How wide is the effect of the phrase "judgements previously rendered shall not be affected"?	26
v. Can the CFA review mainland legislation?	26
1) <i>Ma Wai Kwan</i>	26
2) <i>Ng Ka Ling</i>	26
3) Clarification of <i>Ng Ka Ling</i>	26
D. Appointment and tenure of Judges	27
E. Judicial Independence under the Basic Law	27
F. Judicial Immunity and judicial accountability	27
i. Prior to 1 July 1997	27
ii. What is the scope of the immunity after 1 July 1997?	28
1) <i>Sirros</i>	28
iii. Judicial Accountability	28
G. Jury System	29



6. THE LAW MAKING PROCESS.....	29
A. Role of the HKSAR Government and the Chief Executive.....	29
B. Role of the Legislative Council	29
C. Law Making Process	30
D. Emergency Regulations.....	30
7. ACCESS TO JUSTICE.....	30
A. Legal Aid	30
i. Forms of Legal Aid.....	30
ii. Operation of Legal Aid	30
iii. Characteristics of Legal Aid.....	30
iv. Legal aid and resources.....	31
B. Duty Lawyer Scheme	31
C. Legal Aid Services Council.....	31
D. Independence of Legal Aid Authority.....	32
E. Regulating the Legal Profession	32
8. THE COMMON LAW SYSTEM AND THE PRC LEGAL SYSTEM: A COMPARATIVE OVERVIEW	33
A. Meaning of Sovereignty.....	33
i. China's position on self-determination.....	33
B. How the NPCSC interprets laws.....	33
i. Supreme People's Court.....	34
C. Interpretation approach in HK – Common Law interpretation	35
i. Purposive approach	35
ii. Advantages of common law approach	35
iii. Purposive approach and interpreting the BL.....	36
1) Requirements.....	36
2) Difficulties.....	36
D. Conflicts in Interpretation.....	36
9. THE CIVIL AND CRIMINAL JUSTICE SYSTEM	37
A. Fundamentals of civil and criminal litigation	37
i. Criminal Proceedings.....	37
ii. Civil Proceedings.....	38
B. Alternative Dispute Resolution.....	39
i. Arbitration.....	39
ii. Mediation.....	39
10. INTERFACE BETWEEN THE TWO SYSTEMS	40
A. Concurrent Jurisdiction	40
B. Mutual Judicial Assistance.....	40
C. Enforcement of Judgments and Arbitral Awards.....	40
D. Extradition/Rendition.....	41
E. Cross-Border Crimes and Jurisdiction.....	41
F. Cross-Border Insolvency	41
G. Conflicts Between The Two Systems	42
H. Admissibility Of Documents Issued In The Mainland	42
I. Taking Evidence In The PRC	42
J. International legal services centre / international commercial dispute resolution centre in the Greater Bay Area	42



11. INTRODUCTION TO LEGAL RESEARCH: SOURCES AND SKILLS43
 A. Law Reports and Judgments- reported and unreported judgments..... 43

12. ENFORCING THE LAW.....43
 A. Police Powers 43
 B. Department of Public Prosecutions..... 43
 C. Independent Commission Against Corruption..... 44
 D. The Ombudsman 44

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!

B. ABBREVIATIONS

The Hong Kong Legal System Notes will refer frequently to the following using abbreviations.

Hong Kong Special Administrative Region	SAR
Basic Law	BL
People's Republic of China	PRC
National People's Congress	NPC
National People's Congress Standing Committee	NPCSC
Court of Final Appeal	CFA
New Territories	NT
Chief Executive	CE
Central People's Government	CPG
Bill of Rights Ordinance	BOR
Sino-British Joint Declaration 1984	JD



2. DEVELOPMENT OF THE HONG KONG LEGAL SYSTEM (1842-1997)

A. BACKGROUND

- 1841 Captain Elliot's Proclamations made 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 for HK.
- 1861 after first Convention of Peking ceding Kowloon – Order in Council – made Kowloon part of the colony of HK.
- 1898 - Second Convention of Peking - leased New Territories to Britain for 99 years.
- 1899 - Chinese officials expelled from Walled City of Kowloon.

i. SUPREME COURT ORDINANCE 1873

Section 5 of the Supreme Court Ordinance 1873 provided that 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.

However, in practice, this cut-off date applied for statutes only.

ii. THE APPLICATION OF ENGLISH LAW ORDINANCE 1966

The Application of English Law Ordinance 1966 deleted the date of reception thereby officially allowing post-1843 English decisions to be binding in the colony. Section 3 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.'

This meant that common 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 in HK. Therefore the cut-off date is still relevant. Section 3 only applies to English legislation passed after the date or to earlier legislation never in force in HK.

Furthermore, this also meant that common law and equity are only in force in HK to the extent of their applicability to circumstances of HK. The court imposed a strict test and held that common law and equity are inapplicable to HK only if it caused injustice or oppression.

Section 4 of the Ordinance further provides for the reception in HK of prerogative legislation and Acts of UK parliament.

This in effect split the law into 2 types - enactments, and common law and equity.



iii. SINO-BRITISH JOINT DECLARATION 1984

The 1984 Sino-British Joint Declaration saw China formally accepted that Britain was responsible for the administration of HK until 1 July 1997.

Article 3 provides 12 Basic Policies:

- The HK SAR government 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 lifestyle of inhabitants will remain unchanged
- Basic policies will remain unchanged for at least 50 years

1) Interpretive value

Since the Joint Declaration is an international treaty, it is not part of HK law and does not in itself confer rights enforceable under HK law.

Nonetheless, the Court of Final Appeal recognised that the Joint Declaration could be used to interpret provisions in the Basic Law (*Ng Ka Ling v Director of Immigration* (1999)). Courts have shown a readiness to attach weight to the Basic Policies when interpreting the Basic Law. In the case of *Gurung Kesh Bahadur v Director of Immigration* (2001), it held that freedom of travel was a basic policy laid down by the Joint Declaration. As such the court upheld a challenge to the Immigration Department's decision which was contrary to article 31 of the Basic Law.

Furthermore the preamble of Basic Law states that its purpose is to implement the PRC's 12 Basic Policies regarding HK.

Lastly, article 159 of the Basic Law also prevents the Basic Law being amended in any way that contravenes these Basic Policies.

iv. BASIC LAW

The Basic Law provides in article 8 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."

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.

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. Article.18 shows that the main sources of law for HK are:

- Basic Law (article 11)
- Laws previously in force as stipulated in article 8 BL
- Laws enacted by the SAR
- Laws enacted by the NPC or NPCSC which relate to defence and foreign affairs and otherwise as stated in article 18 BL
- Note NPCSC has the final right to interpret (article 158 BL)

A. LAW PREVIOUSLY IN FORCE (ARTICLE 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 1 July 1997.

i. COMMON LAW & EQUITY

It is open to the HK SAR to regard only the pre-transfer decisions of the Privy Council and the House of Lords as binding, but with the right of the Court of Final Appeal to depart from them if it considers them wrong. Thus English law is still likely to *remain influential* in the 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. In most of these cases, the HK courts simply followed and confirmed the approach taken by the Privy Council, House of Lords and Court of Appeal.

ii. LEGISLATION

Legislative developments in England are likely to *remain influential*. This is because many of the ordinances that have been retained are similar to equivalent English Acts.

iii. CUSTOMARY LAW

It is unlikely that the BL is intended to expand the scope of customary law. As such the state of customary law is likely to remain the same as prior to the changeover.



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

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