

**Preparatory Courses for PCLL
Admission Conversion
Examinations (2012/2013)**

Hong Kong Constitutional Law

Lecture notes 1

Acquisition of British Sovereignty

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Reading Materials:

Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (HKU Press, 2nd edition 1999), Chapter 1.

Leo Goodstadt, *The Conflict Between Public Interest and Private Profit in Hong Kong* (HKU Press, 2005), Chapter 3.

Norman Miners, *The Government and Politics of Hong Kong* (Oxford University Press, 5th edition, 1998), Chapters 5-7

Benny Tai Yiu-ting, *The Development of Constitutionalism in Hong Kong*, in Raymond Wacks, ed., *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999)

Steve Tsang, *Democracy Shelved: Great Britain, China and Attempts at Constitutional Reform in Hong Kong, 1945-52* (Oxford University Press, 1988).

Peter Wesley Smith, *Constitutional and Administrative Law in Hong Kong* (China and Hong Kong Law Press, 1995), Chapters 2 and 5.

Peter Wesley Smith, *Unequal Treaties 1898-1997: China, Great Britain and Hong Kong's New Territories* (Oxford University Press, 1998), Chapter 10.

Hong Kong Letters Patent 1917-1995, Available at <http://www.hkii.org/hk/legis/en/ord/2701.txt>

Hong Kong Royal Instructions 1917-1993 (Nos. 1 and 2), Available at <http://www.hkii.org/hk/legis/en/ord/2702.txt>

Basis of British Jurisdiction in Hong Kong:

Britain officially occupied Hong Kong Island in January 1841 during the First Opium War with China (1839-42).

Hong Kong Island was then formally ceded to Britain under Article 3 of the Treaty of Nanking [Nanjing] (29 August 1842) that ended the war:

“It being obviously necessary and desirable that British subjects should have some port whereat they may [maintain] and refit their ships when required, and keep stores for that purpose, His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, &c., the Island of Hong-Kong, to be possessed in perpetuity by Her Britannic Majesty, her heirs and successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, &c., shall see fit to direct.”

During the Second Opium War (1856-60), Sir Harry Smith Parkes, the British Consul in Canton [Guangzhou] negotiated a lease over the southern tip of Kowloon (south of Boundary Street) and Stonecutters Island, in return for an annual rent.

When the war ended, this lease was converted into a cession of the southern tip of Kowloon and Stonecutters Island to Britain under Article 6 of the Convention of Peking (24 October 1860):

“With a view to the maintenance of law and order in and about the harbour of Hong Kong, His Imperial Majesty the Emperor of China agrees to cede to Her Majesty the Queen of Great Britain and Ireland..., to have and to hold as a dependency of Her Britannic Majesty’s colony of Hong Kong, that portion of the township of Cowloon, [Kowloon] in the province of Kwang-tung, [Guangdong] of which a lease was granted in perpetuity to Harry Smith Parkes,...on behalf of Her Britannic Majesty’s Government.”

Beginning in 1894, business interests in Hong Kong began aggressively lobbying for an extension in the size of the colony. Using the excuse of the murder of several foreign missionaries in China, Germany, Russia, France and Britain all pressured the Qing authorities to lease territory to them.

In the Second Convention of Peking (9 June 1898, also known as the Convention for the Extension of Hong Kong Territory), the New Territories (including all of Kowloon north of Boundary Street) was leased to Britain for 99 years from 1 July 1998:

“Whereas it has for many years been recognised that an extension of Hong Kong territory is necessary for the proper defence and protection of the Colony,

It has now been agreed between the Governments of Great Britain and China that the limits of British territory shall be enlarged under lease to the extent indicated generally on the annexed map. The exact boundaries shall be hereafter fixed when proper surveys have been made by officials appointed by the two Governments. The term of the lease shall be ninety-nine years.”

Under the Convention, China was supposed to be allowed to continue to station Chinese officials in the Walled City of Kowloon:

“It is at the same time agreed that within the city of Kowloon the Chinese officials now stationed there shall continue to exercise jurisdiction except so far as they may be inconsistent with the military requirements for the defence of Hong Kong. Within the remainder of the newly-leased territory Great Britain shall have sole jurisdiction. Chinese officials and people shall be allowed as heretofore to use the road from Kowloon to Hsinan.”

But after Britain took actual control of the New Territories on 17 April 1899, it decided to expel Chinese officials from the Walled City of Kowloon on 16 May 1899, on the grounds that their presence was “inconsistent with the military requirements for the defence of Hong Kong.”

China never accepted this expulsion, which may have been a violation of the terms of the Convention. According to Wesley-Smith (*Unequal Treaties 1898-1997* at pp. 276-80), British law officers privately warned that “Apart from the defence of military requirement, we think that the British case is weak.”

As a result, Britain abandoned plans to take the issue of jurisdiction over the Walled City of Kowloon to international arbitration. It was also careful not to redevelop the Walled City until after the signing of the Sino-British Joint Declaration in 1984, when China finally recognised British jurisdiction over all of Hong Kong (including the Walled City) until 1 July 1997—so allowing the Hong Kong Government to finally move in and demolish the Walled City.

The 1898 Convention also included a provision allowing Chinese warships, merchant and passenger vessels to use a pier near Kowloon City. But this became irrelevant once the area was reclaimed to make way for Kai Tak airport.

In addition, another provision in the 1898 Convention protected residents of the New Territories from being expelled or having their land expropriated:

“It is further understood that there will be no expropriation or expulsion of the inhabitants of the district included within the extension, and that if land is required for public offices, fortifications, or the like official purposes, it shall be bought at a fair price.”

According to Wesley-Smith (*Constitutional and Administrative Law in Hong Kong*, at p 29), this “no expropriation clause has persuaded the government to adopt a generous land policy in the New Territories, with the Letter A and Letter B schemes enabling rural landowners to participate in the development value of their traditional holdings.”

The Unequal Treaties:

The 1842 Treaty of Nanking and the 1860 Convention of Peking under which Hong Kong and Kowloon were ceded to Britain were clearly unequal treaties, forced upon China through the use of force.

Under Article 52 of the Vienna Convention on the Law of Treaties 1969:

“A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”

(NB. However the Vienna Convention is not retrospective and so does not apply to pre-1969 treaties.)

The position regarding the 1898 Second Convention of Peking is less clear in international law. It was not obtained through either force or the explicit threat of force. However it can certainly be argued that there was an implicit threat of force, and Ghai believes (see p12) that it would also have been void under the Vienna Convention had it been in force at the time.

In any China adopts a much broader view of what constitutes an unequal treaty. See Ghai at pp. 10-11, citing a dictionary published by the Jilin People’s Publishing Corporation in 1991 which describes unequal treaties as those “concluded by the coercion of one party through unjust methods with the aim of imposing unequal obligations on the other party.”

Upon taking power, the Chinese Communists announced that they would review all treaties signed between the Kuomintang and foreign governments and reserved the right to abrogate any of them.

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See Article 55 of the 1949 Common Program of the Chinese People's Political Consultative Conference (which, although officially called a program, in practice served as Communist China's first constitution until the enactment of a formal constitution in 1954):

"The Central People's Government of the People's Republic of China shall examine the treaties and agreements concluded between the Kuomintang and foreign governments, and shall recognize, abrogate, revise, or re-negotiate them according to their respective contents."

This was later extended to all treaties signed before the Communists took power.

The Chinese position is that all treaties which China signed before the Communists took power are unequal treaties and void in international law. This is based on its interpretation of general principles of international law which predate the Vienna Convention, and is disputed by other international law scholars (See Ghai, at pp. 11-12 and Wesley-Smith (*Unequal Treaties 1898-1997* at pp. 298-301).

This means that, as a matter of law, China never recognised British sovereignty over any part of Hong Kong. That explains why, for instance, all Hong Kong Chinese born in Hong Kong when it was still a British colony are automatically considered Chinese nationals, because they were born in part of China (albeit part of China temporarily under British occupation). See Article 4, China's Nationality Law 1980:

It also meant that the beginning of the 1984 Sino-British Joint Declaration had to be worded as a series of parallel statements by Britain and China to avoid compromising China's position that it did not recognise British sovereignty over Hong Kong:

Article 1

"The Government of the People's Republic of China declares that to recover the Hong Kong area (including Hong Kong Island, Kowloon and the New Territories, hereinafter referred to as Hong Kong) is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997."

Article 2

"The Government of the United Kingdom declares that it will restore Hong Kong to the People's Republic of China with effect from 1 July 1997."

However, in the Joint Declaration, China also formally accepted that Britain was responsible for the administration of Hong Kong until 1 July 1997:

Article 4

"The Government of the United Kingdom and the Government of the People's Republic of China declare that, during the transitional period between the date of the entry into force of this Joint Declaration and 30 June 1997, the Government of the United Kingdom will be responsible for the administration of Hong Kong with the object of maintaining and preserving its economic prosperity and social stability; and that the Government of the People's Republic of China will give its cooperation in this connection."

This allowed the Hong Kong Government to finally move in and demolish the Walled City of Kowloon, which Britain had not been granted sole jurisdiction over under the 1898 Convention.

Sovereignty and Self-Determination (from Topic 2)

“Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all people’s to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles.”

Hurst Hannum, *Autonomy, Sovereignty and Self-Determination* (University of Pennsylvania Press, 1990), p 27

Historically, considerable dispute over whether the principle of self-determination includes a right to *secede* from an existing state. Possible to argue that right to self-determination only means a right of meaningful participation in how a community is governed, and that the right to secede is at odds with principle of national sovereignty:

“To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.”

The Aland Islands Question, *Report presented to the Council of the League by the Commission of Rapporteurs* (1921); cited by Hannum at p 29.

China’s Position on Self-Determination (from Topic 2)

China’s Communists did recognize a right of self-determination for the people in minority areas of China, before they took power. See the *Resolution of the First All-China Congress of Soviets on the Question of National Minorities in China, 1931*.

But this right was abandoned shortly after taking power in 1949. See Article 51 of the *Common Program of the Chinese People’s Political Consultative Conference*.

And the current Chinese constitution makes it a crime to promote secession (Article 4) and imposes a duty on all Chinese citizens to “safeguard the unity of the country” (Article 52).

Self-Determination and the United Nations (from Topic 2)

Self-determination is mentioned twice in the 1945 United Nations Charter, but in both cases in the context of “friendly relations among nations.” See Articles 1(2) and 55.

Self-determination is not mentioned in the 1948 Universal Declaration of Human Rights

Self-determination is mentioned prominently in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

“All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.”

Both covenants were ratified by Britain and extended to Hong Kong when they came into force in 1976. However Britain adopted a “reservation” stating that Article 1 of the covenants would not apply to Hong Kong, in so far as it contradicted any of Britain’s other international obligations under the United Nations charter. This was effectively intended to exclude any right of self-determination as far as Hong Kong is concerned.

Both covenants “as applied to Hong Kong” remain in force today under Article 39 of the Hong Kong Basic Law. This formulation is generally interpreted as meaning that the applicability of the covenants in Hong Kong remains subject to the same reservations originally entered by Britain.

Self-determination was also enshrined as a right for the people of all colonies in the Declaration on the Granting of Independence to Colonial Countries and People adopted by the U.N. General Assembly in 1960.

But in 1972, China wrote to the United Nations Special Committee on the Declaration on Decolonization asking for Hong Kong and Macao to be removed from its agenda:

“The questions of Hong Kong and Macao belong in the category of questions resulting from the series of unequal treaties which the imperialists imposed on China. Hong Kong and Macao are part of Chinese territory occupied by the British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China’s sovereign right and does not at all fall under the ordinary category of colonial territories. Consequently they should not be included in the list of colonial territories covered by the declaration on the granting of independence to colonial countries and people.”

Britain did not object to this request, which was approved by the U.N. committee and meant that Hong Kong was no longer included on the U.N.’s list of colonial territories entitled to self-determination.

Britain also began calling Hong Kong a “territory” instead of a “colony.” Some colonial terms were changed, e.g. Colonial Secretary became Chief Secretary (now Chief Secretary for Administration).

The Assumption and Exercise of British Authority:

The assumption and exercise of British authority was summarized by the Court of Final Appeal in *Suen Toi Lee v. Yau Yee Ping* [2002] 1 HKLRD 197 (a case involving Chinese customary law) by Li, CJ:

“By a circular dated 20 January 1841 and addressed to British subjects, Captain Charles Elliot announced the cession of Hong Kong to Britain. This announcement was followed by two proclamations. The first was dated 1 February 1841. It was made jointly by Commodore Sir J.J.G. Bremer and Captain Elliot, and was addressed to the Chinese inhabitants of Hong Kong. The second was dated 2 February 1841. It was made by Captain Elliot alone, and was addressed to British subjects.

The full text of these two proclamations are to be found at pp 4-6 of Vol. 1 of “Norton-Kyshe’s The History of the Laws and Courts of Hong Kong” (1898). By the Bremer-Elliot Proclamation, the Chinese inhabitants of Hong Kong were told that they were “secured in the free exercise of their religious rites, ceremonies, and social customs” and that they would “be governed, pending Her Majesty’s pleasure, according to the laws, customs, and usages of the Chinese (every description of torture excepted) by the elders of the villages, subject to the control of a British magistrate”. By the Elliot Proclamation, British subjects were told that “pending Her Majesty’s further pleasure, the natives of the island of Hong Kong, and all natives of China thereto resorting, shall be governed according to the laws and customs of China, every description of torture excepted”.”

The Bremer-Elliot proclamation also stated that Hong Kong island “has now become part of the dominions of the Queen of England by clear public agreement between the High Officers of the Celestial and British Courts; and all native persons residing therein must understand that they are

now subjects of the Queen of England and to whom and to whose officers they must pay duty and obedience.”

The provision in the proclamations that “the natives” of Hong Kong would continue to be governed by Chinese laws and customs (although this did not apply to British subjects and foreigners) was in accordance with the standard position under British law that the laws of the conquered country continue to apply unless and until they are changed by the colonizer in any colony acquired either by conquest (as was initially the case, through Britain’s 1841 occupation of Hong Kong Island) or through cession (as subsequently became the case with the signing of Treaty of Nanking in 1842).

Although most Chinese law was quickly replaced by Hong Kong and British laws, some customary Chinese law remained in force well into the 20th Century, particularly in the area of family and property disputes. In a few cases (e.g. land disputes in the New Territories), it was never entirely replaced by Hong Kong or British law. See, for instance, s13 of the New Territories Ordinance, giving the District Court and the Court of First Instance “the power to recognize and enforce any Chinese custom or customary right affecting such land.”

In 1843, following the formal exchange of ratified copies of the Treaty of Nanking between the British and Chinese Governments, a Royal Charter dated 5 April 1843 (but not formally published until after the exchange of copies on 26 June 1843) proclaimed Hong Kong as a British colony with a Governor and a Legislative Council. This Royal Charter—which later became known as a Letters Patent—empowered the Governor:

“with the *advice* of the said Legislative Council ... to make and enact all such Laws and Ordinances as may from time to time be required for the peace, order and good government ... of Hong Kong.”

[NB. The wording was later changed to “with the *advice and consent*.”]

Hong Kong then adopted most of the laws that existed in England at the time it became a British colony as Hong Kong laws. See s5 Supreme Court Ordinance 1873:

“Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or its inhabitants, and except so far as they have been modified by laws passed by the said legislature.”

After the Convention of Peking (24 October 1860) ceding Kowloon (south of Boundary Street) to Britain, Queen Victoria issued an Order in Council on 4 February 1861 making Kowloon part of the colony of Hong Kong.

Again, after the Second Convention of Peking leasing the New Territories to Britain for 99 years, Queen Victoria issued another Order in Council known as the “New Territories Order in Council,” making the New Territories part of the colony of Hong Kong:

Following the expulsion of Chinese officials from the Walled City of Kowloon, this was followed by another Order in Council known as the “Kowloon City Order in Council” revoking Article 4 of the “New Territories Order in Council” and making the Walled City part of the colony of Hong Kong

The New Territories Order in Council and, especially, the Kowloon City Order in Council arguably contravened the terms of the treaty under which the New Territories was leased to Hong Kong.

As we’ve seen, British law officers were sufficiently unsure of the strength of Britain’s case on the seizure of Walled City of Kowloon (despite the provision in the 1898 Convention giving

Chinese officials' jurisdiction there) that they advised against taking the issue to international arbitration.

Although the New Territories Order in Council only applied "*for the term described in the said Convention*" (i.e. for a period of 99 years), during that period it treated the New Territories "as part and parcel of Her Majesty's Colony of Hong Kong in like manner and for all intents and purposes as if they had originally formed part of the said Colony," i.e. it made no distinction between Hong Kong Island and Kowloon (which had been *ceded* to Britain in perpetuity under the earlier treaties) and the New Territories (which had only been *leased* to Britain for 99 years).

In effect, Britain treated the New Territories not as have been leased but rather as having been *ceded for 99 years*, a formula attacked by Wesley Smith (see *Constitutional and Administrative Law in Hong Kong*, at p 27) who says it did "not really make sense, because a cession is by definition a transfer of sovereignty in perpetuity."

Wesley Smith draws the analogy between a landlord and a tenant. While a landlord (as Britain arguably was over Hong Kong Island and Kowloon) has wide rights to do with his property as he pleases, a tenant only holds a lease for a specified period (as Britain did over the New Territories) and is much more limited in his rights as to what he can do with the property.

Chinese officials also interpreted the 1898 Convention as giving Britain less than full rights over the New Territories, and initially demanded that those living there continue to pay tax to Chinese authorities (See Wesley Smith, *Unequal Treaties 1898-1997* at pp. 273-74).

However attempts to argue in the Hong Kong courts that Britain had broken the terms of the 1898 Convention were unsuccessful. This is because the Convention, like all international treaties, is not directly enforceable in the courts under Hong Kong or British law.

Instead it is the Orders in Council that provided the legal basis for the exercise of British authority in Hong Kong until 1 July 1997, as far as the Hong Kong courts were concerned.

In *Re Wong Hon* [1959] HKLR 601 lawyers for a Chinese national accused of committing a murder inside the Walled City of Kowloon applied for a writ of *habeas corpus* on the grounds that the Walled City of Kowloon was outside the jurisdiction of the British colony of Hong Kong:

"It is alleged that Wong Hon is not a British subject but a national of China and that the offence with which he stands charged occurred within the area known as the City of or the Walled City of Kowloon. The argument advanced in support of the application is that the Convention between Great Britain and China dated 9th June, 1898, which leased a certain area now known as the New Territories to the British Crown for a period of 99 years, excepted therefrom the Walled City of Kowloon or reserved jurisdiction within that area to officials of China; and that since Wong Hon is an alien and not a British subject, the British Courts in Hong Kong cannot purport to exercise jurisdiction over him in respect of an offence committed within the area of the Walled City."

But this argument was dismissed by the court on the grounds that the "Kowloon City Order in Council" extended British jurisdiction to the Walled City of Kowloon and that this and the New Territories 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."

Note that this case was decided at a time when it was still the position in English law that no actions of the Royal Prerogative can be challenged in the courts. That position was changed by the House of Lords in *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935 but it is unlikely it would affect the decision in this case, since many parts of the Royal Prerogative, remain outside the jurisdiction of the courts and it is likely this includes Britain's position as to the boundaries of its colonies.

In *Winfat Enterprises (HK) Co Ltd v. Attorney-General* [1985] 2 WLR 786 a challenge to the resumption of a plot of land by the government in the New Territories on the grounds that the 1898 Convention protected New Territories residents against any “expropriation” of land was rejected partly on the grounds that the New Territories Order in Council gave Britain full jurisdiction over the New Territories without any such restrictions.

Constitution and the System of Government:

Although not nearly as well known as the Hong Kong Basic Law, Hong Kong also had a written constitution under British rule.

This consisted of two documents:

- 1) A Letters Patent, which was originally issued as a Royal Charter dated 5 April 1843
- 2) Royal Instructions, originally issued on 6 April 1843

Both documents were made directly by the British Queen (or King)—in the case of the Royal Instructions they are actually signed by the monarch—without any involvement of the British parliament, although in practice they are drafted by the British government in power at the time.

Both are much shorter than the Hong Kong Basic Law, which consists of 160 articles. The Letters Patent consists of only 21 articles, while the Royal Instructions stretch to 37 clauses.

But that is because the colonial system of government set out in the Letters Patent, which is the most important of the two documents, and supplemented by the Royal Instructions sets out a much simpler system of government.

Unlike the check and balances between the different branches of government under the Hong Kong Basic Law, the colonial constitution set out a gubernatorial system of government where the colonial Governor was, at least in theory, all powerful:

“The powers which are conferred on the Governor by the Letters Patent are awesome and may be compared to those once possessed by a King of England before the coming of democracy and the rise of political parties with ministers responsible to parliament. ... If he chose to exercise the authority granted to him up to its full legal limits he could impose his arbitrary will on the whole machinery of government, completely reverse past policies, and set the whole colony in turmoil.” (Norman Miners, *The Government and Politics of Hong Kong* at p 69).

The Governor was both Chief Executive and the Hong Kong legislature since, although Article 6 of the Letters Patent provides for the existence of a Legislative Council, under Article 7 is the Governor that makes laws:

“The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good government of the Colony.”

Under Article 10 of the Letters Patent, the Governor had the power to refuse to assent to any law passed by the Legislative Council and so prevent it from becoming law.

(Compare this to the Chief Executive’s power under the Hong Kong Basic Law to refuse to sign into law any bill “not compatible with the overall interests of the region.” This power may, under certain circumstances be overridden by passage by a two-thirds majority and, ultimately, fresh elections. See Articles 49-52, Hong Kong Basic Law.)

Under Article 28A of the Letters Patent, the Governor also had an unrestricted power to dissolve the Legislative Council “at any time.”

(Compare this to the Chief Executive's more restricted power under the Hong Kong Basic Law to dissolve the Legislative Council if it refuses to pass his "budget or any other important bill" or continues to pass a law he has vetoed. This power can only be exercised once during the Chief Executive's five-year term and, in some circumstances, can lead to him being forced to resign. See Articles 50 and 52, Hong Kong Basic Law.)

Similarly, although Article 5 of the Letters Patent provided for the existence of an Executive Council that offered advice to the Governor, Clause 12 of the Royal Instructions allowed him to reject the advice of the Executive Council at any time, subject only to a requirement to report this rejection to the British Government:

"The Governor may, in the exercise of the powers and authorities granted to him by Our said recited Letters Patent, act in opposition to the advice given to him by the Members of the Executive Council, if he shall in any case deem it right to do so; but in any such case he shall fully report the matter to Us by the first convenient opportunity, with the grounds and reasons of his action."

(The Chief Executive possesses a similar power, under Article 56(3) of the Hong Kong Basic Law, to reject the advice of the Executive Council providing he puts "the specific reasons on record.")

The Governor also had an unrestricted power, under Article 14(1) of the Letters Patent, to appoint judges and other public officers:

(Compare this with the Chief Executive's more restricted power to appoint judges under Article 88 of the Hong Kong Basic Law, which can only be exercised "on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.")

In addition, Article 18 of the Letters Patent also includes a general requirement for everyone in Hong Kong to obey the Governor's instructions:

"And We do hereby require and command all Our officers and ministers, civil and military, and all other the inhabitants of the Colony, to be obedient, aiding and assisting unto the Governor and to any person for the time being administering the Government of the Colony."

In practice, British Governors did not exercise anything like the full extent of their powers under the colonial constitution.

For instance, although Article 18 of the Letters Patent required all officers to obey the Governor, in practice the Attorney General (the position which, after 1 July 1997, became the Secretary for Justice) alone decided whether to initiate a criminal prosecution.

(This means that the position in practice under British rule, as opposed to the formal position under the colonial constitution, was the same as it now is under Article 63 of the Hong Kong Basic Law which states that:

"The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.")

While the Governor had an unrestricted power to appoint judges under Article 14(1) of the Letters Patent, in practice he only exercised this on the advice of an independent Judicial Service Commission.

(After 1 July 1997, this commission became the Judicial Officers Recommendation Commission and is the body which advises the Chief Executive on what judges he must appoint under Article 88 of the Hong Kong Basic Law. Again this means that the position, in practice under British rule,

as opposed to the formal position under the colonial constitution, was the same as it is now under the Hong Kong Basic Law.)

And while the Governor had the power under Article 10 of the Letters Patent, had the power to refuse to assent to any law passed by the Legislative Council and so prevent it from becoming law, in practice this power was only once ever exercised in Hong Kong's 150 years as a British colony (in 1946, over the British Cinematograph Films Bill).

These constraints, in practice, on how the Governor exercised his sweeping powers under the colonial constitution are described as constitutional conventions by Norman Miners (in *The Government and Politics of Hong Kong* (Oxford University Press, 5th edition, 1998) at pp. 61-63).

See, however, Ghai (p 17) who argues that they were not really conventions because they were not treated as "binding" by those upon whom they operated:

"Given that Hong Kong did not progress to representative institutions and was not destined for independence, conventions, contrary to some opinion (Miners 1991: 61—63), have not played a significant role. Not all the examples Miners cites of the divergence between the legal provisions and practice are really instances of conventions properly understood, that is, treated as binding (as is evidenced from increased Whitehall intervention in policy and administration in Hong Kong in the last few years before the transfer of sovereignty). Such as they were, they operated within an overarching framework in which the Governor's position remained dominant and membership of key institutions was through his nomination."

Remember that A.V. Dicey defined conventions in broad terms as any type of: "rules which though they may regulate the conduct of the several members of the sovereign power, of the ministers or other officials, are not in reality laws at all since they are not enforced by the courts."

By contrast, Sir Ivor Jennings focussed more narrowly on conventions as more binding rules of conduct (albeit enforced by political rather than legal sanctions): "The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work."

Sonny Shiu Hing Lo explains (in *Emergence of Constitutional Conventions in the Hong Kong Special Administrative Region*, 35 HKLJ 103, 108, 113-114) the difference between Ghai and Miners (and two other political scientists, Stephen Davies and Elfed Roberts) in terms of their relying on different definitions of constitutional conventions:

"While Miners, Davies and Roberts chose to adopt the definition of conventions as advanced by Dicey, Ghai appeared to use a relatively narrower definition of conventions as articulated by Jennings."

"If we adopt Jennings' criteria of conventions, it can be said that the practice of consulting public opinion was by no means firmly entrenched in Hong Kong under British rule. The reason is that the administration of Governor Edward Youde and Governor David Wilson could choose to turn a blind eye to public opinion, and to interpret it in a way that maintained Sino-British harmony. To borrow from Jennings, the political actors or the colonial rulers did not believe in the need to consult and respect public opinion over the future of Hong Kong and the introduction of direct election to the LegCo in 1988.

The so-called conventions as discussed by Miners, Davies and Roberts appeared to be practices that were not really obligatory."

Further support for Ghai's view can be found in the last Governor, Chris Patten's threat in his October 11, 1995 policy address to use this power to refuse to assent to any bill "not in the interest of Hong Kong."

That followed press reports that Chris Patten would have refused to assent to a private member's bill moved by Emily Lau providing for all members of the Legislative Council to be directly elected had it been passed in July 1995 (it was defeated by one vote).

One notable omission from the colonial constitution, until the final years of British rule, was any provisions protecting human rights.

Most constitutional documents have extensive provisions protecting basic freedoms. See, for instance, the 19 articles in Chapter 3 of the Hong Kong Basic Law: Fundamental Rights and Duties of the Residents.

However in Hong Kong, traditionally, human rights were instead protected through the common law system and values (e.g. habeas corpus), and the ultimate resort of raising any human-rights violations in the democratically elected parliament of the colonial power in London.

Prior to 1991, no provision in the Letters Patent mentioned human rights.

However the situation changed fundamentally in 1991 when the Hong Kong Bill of Rights Ordinance was enacted, in response to public pressure for stronger protection of human rights after the 4th June 1989 Tiananmen massacre in Beijing.

The Bill of Rights Ordinance incorporated most of the rights contained in the International Covenant on Civil and Political Rights into Hong Kong and, in order to give it a superior status to other laws during the remaining years of British rule, the Letters Patent was amended by adding a new Article 7(5) referring to the covenant:

“The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No. 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.”

Political Reform in the Fifties:

Although Legislative and Executive Councils were created by the Royal Charter in 1843, they initially consisted entirely of government officials chosen by the Governor.

The first two unofficial (i.e. from outside the government) members were appointed in 1850, and from 1884 the Hong Kong General Chamber of Commerce and local Justices of the Peace were allowed to nominate one member each for appointment to the Legislative Council.

The first unofficial member was appointed to the Executive Council in 1896 and their numbers were gradually expanded so that, by the 1930s, the Executive Council consisted of three unofficial members and seven official members. By then, the Legislative Council consisted of eight unofficial members and ten official members. All were still appointed by the Governor (although in two cases on the basis of recommendations from the Hong Kong General Chamber of Commerce and local Justices of the Peace.)

The first small-scale elections came when an Urban Council was set up in 1936, consisting of eight unofficial members and five official members. Two of the unofficial members were elected by those on the jury list in Hong Kong (i.e. who could understand English).

During World War II, while Hong Kong was under Japanese occupation, British policy evolved toward giving self-government to its colonies (see Tsang p 12). And after the war was over, a

Labour Government took power in Britain with the goal of moving in this direction—including in Hong Kong.

When Sir Mark Young (who had left Hong Kong at the beginning of the war) returned to Hong Kong, he announced (on 1 May 1946) what became known as the “Young Plan” for the first steps toward representative government in Hong Kong:

“Her Majesty’s Government has under consideration the means by which in Hong Kong, as elsewhere in the colonial empire, the inhabitants of the territory can be given a fuller and more responsible share in the management of their own affairs. One possible means of achieving this end would be by handing over certain functions of internal administration, hitherto exercised by the Government, to a municipal council constituted on a fully representative basis. The establishment of such a Council, and the transference to it of important functions of government might, it is believed, be an appropriate and acceptable means of affording to all communities in Hong Kong an opportunity of more active participation, through their responsible representatives, in the administration of the territory.”

Two thirds of the proposed municipal council would be elected, half each by Chinese and non-Chinese residents of Hong Kong (the proposal further discriminated against Chinese by requiring them to live in Hong Kong for six years before they could vote, as opposed to one year for non-Chinese). The remaining members would be chosen by local bodies. None would be appointed by the Governor.

If it had been established, the proposed municipal council would likely have acted as a model for the wider introduction of democracy—since it would have not been subject to direct control by the Governor or the Legislative Council, and assumed wide-ranging powers, including over education, social welfare and public works. It would, however, only have covered Hong Kong and Kowloon—excluding the New Territories.

However Young proposed only minor changes to the Legislative Council, reducing the number of official members so that unofficial members (all still appointed by the Governor) would have a slight majority for the first time.

In late 1946, Arthur Creech-Jones, who had become Britain’s new Colonial Secretary (at that stage, the British Ministry responsible for dealing with Hong Kong and other colonies) put forward more sweeping proposals for reforming the Legislative Council.

These would have seen the introduction of elections to the Legislative Council, with no discrimination between Chinese and non-Chinese voters. The number of members on the Legislative Council elected by the Hong Kong public would have been equal to the number of government officials appointed by the Governor to the Legislative Council. Further unofficial members would have been appointed by the Governor, so that the official members were in a minority for the first time.

The unofficial members (both elected and appointed) would then have elected a Speaker of the Legislative Council (the position now known as President of the Legislative Council) to replace the Governor who then chaired the Legislative Council, although the first speaker would have been nominated by the Governor.

(Note: This reform was not, in fact, achieved until the 1990s—the Governor stepped down from chairing the Legislative Council 1991, and appointed a replacement, Sir John Swaine. In 1995, Legislative Councillors elected their own president for the first time, Andrew Wong Wang-fat.)

A quasi-ministerial system would have also been created, with some unofficial members of the Legislative Council being appointed to serve in the government where they would gradually take on ministerial-like responsibilities for particular departments.

However neither of these plans were ever implemented, Sir Mark Young successfully argued in favor of his plan to instead concentrate on the creation of a new municipal council. And even this was dropped after Sir Alexander Grantham succeeded Sir Mark Young as Governor in July 1947.

Grantham argued that an elected municipal council would pose a threat to the Legislative Council, which was not elected and argued it risked being infiltrated by Chinese Communists. He invited existing unofficial members of the Legislative and Executive Councils (who would have been threatened by the Young Plan) to come up with alternatives.

They proposed rejecting the idea of an elected municipal council in favor of reforming the Legislative Council to give the unofficial members a majority, and allow for direct elections for six seats.

These were watered down by Grantham into his own proposal for indirect elections for six seats in order to ensure what Tsang (p 110) calls “the election of a ‘safe’ Legislative Council in all circumstances.” These elections would be through the Hong Kong General Chamber of Commerce, Hong Kong Chinese Chamber of Commerce, Urban Council and unofficial Justices of the Peace.

However Grantham was unenthusiastic about any kind of political reform and even this modest proposal was ultimately abandoned. Political turmoil in China (with the victory by the Communists in 1949) made London more cautious about introducing major reforms in Hong Kong and allowed Grantham and others to warn that any moves toward democracy risked providing a political platform for the Kuomintang and the Communists in Hong Kong.

“In 1952, Grantham persuaded both his minister and the British Cabinet to abandon all plans for political reform. He got them to withdraw the undertaking to introduce a democratically-elected legislature because ‘the matter did not interest the British electorate.’ His influence on British thinking was decisive even after his retirement and in 1960, the United Kingdom publicly ruled out the prospect of any ‘radical or major changes’ in Hong Kong’s political system. Grantham did not conceal an antipathy towards ‘catchwords such as democracy.’ Yet, in forcing a reversal of the United Kingdom’s public commitment to constitutional reform, he portrayed London as the villain in these machinations in order to minimize any adverse reaction within Hong Kong against the colonial administration.”

(Leo Goodstadt, *The Conflict Between Public Interest and Private Profit in Hong Kong* at p 57.)

Grantham’s success in changing the policy of the British Government from supporting the early introduction of democracy in Hong Kong to opposing it is a good example of the huge power that British Governors wielded in Hong Kong.

It can be contrasted with the way that Chris Patten, the last Governor of Hong Kong, changed the policy of the British Government during the 1990s from a cautious approach toward democracy toward trying to introduce it more rapidly—again largely at his own initiative.

However the shelving of proposals for political reform in the late 1950s is widely seen by commentators as a missed opportunity (see Goodstadt p 57, Tsang p 213) that shaped Britain’s approach toward Hong Kong for the remainder of its rule.

Had democracy been introduced in the 1950s, it is unlikely that China (just emerging from civil war) would have been in a position to strongly object. The democratic system would then have had three decades to develop before the Sino-British negotiations over Hong Kong’s future, quite possibly leaving China with no choice but to accept it as a reality and incorporate a far greater degree of democracy into both the Sino-British Joint Declaration and the Hong Kong Basic Law.

Instead, as Goodstadt points out (at p 57):

“This exemption from the political reforms that transformed the rest of the British empire shaped the future development of the territory. Grantham, in effect, ensured the continuation of a system in which the key decision-making bodies were packed with ‘like-minded businessmen.’ These elite-dominated political institutions were to survive beyond the transfer of sovereignty in 1997, despite a brief period of limited reforms from 1991 to 1997.”