

Hong kong constitutional law essay sample

Law



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1. INTRODUCTION:

On July 1, 1997, Hong Kong became a Special Administrative Region [SAR] of the People's Republic of China as was provided in Sino -British Joint declaration of 1984. Under the provision of Joint declaration, Beijing was to enact the Basic Law of Hong Kong (Hong Kong's new constitution) , in accordance with the Constitution of the People's Republic of China [PRC] ensuring that ' Hong Kong's earlier life style and capital system , including the law in force , should remain unchanged for fifty years.

China is practicing a single party -dominant model under the communist's political system in which administration is highly politicized and under the control and influence of the communist party. The Communist Party of China [CPC] tries to influence Chinese government and society. Thus, CPC's influence extends to nearly every part of the State Council, which is the highest executive organ of state power. The party dominance over the Chinese government remains despite some recent developments such as development of administrative procedural law and the introduction of civil service reforms.

The Chinese government effected major changes after July 1997 in the Hong Kong political system and some of these changes were reported as transitional but would be phased out. Others, provided for in the Basic Law were to be more permanent. The Chief Executive, the legislature and the Hong Kong Delegation to the people's congress of the Beijing Central government was critical institutions of both transitional and long term significance.

Practicing democracy is rather significant in Hong Kong as it is practicing rule of law, liberal open markets, simplicity of regulations, a low tax heaven, a level playing field, safeguarding the human rights including the free flow of information, a business friendly atmosphere and a rule based society.

2. CONSTITUTIONAL ARRANGEMENTS IN THE LIGHT OF CONSTITUTIONAL PRINCIPLES:

According to Colin Turpin, Constitution can be defined as 'a body of rules, conventions and practices which qualify or regulate the organisation and operation of government. As per Stanley De Smith, Constitution is a central but not the sole feature of the rules regulating the system of the government.

As far as Hong Kong is concerned, constitution refers to the two sets of the constitution. First one relates to the Hong Kong's colonial constitution [Letter Patent and Royal Instruction] which was in effect until the Hong Kong was under the British control. The Second one refers to the "Hong Kong Basic Law" which refers to the current one and the one came into force after Hong Kong administration is taken over by the Republic of China.

The Basic Law of the Hong Kong SAR of the PRC was passed pursuant to Article 31. It was accepted by the PRC and was promulgated on 3 April 1990. It became the constitution of HONG KONG SAR upon its establishment on 1st July 1997 when China resumed the exercise of sovereignty over Hong Kong. [Ng Ka Ling v. Director of Immigration and another {1999}].

The Basic Law of the Hong Kong Administrative region, enacted by the government of the people' Republic of China to become the constitution of Hong Kong upon reversion , also ensures to continue the same and offers for a government identical in style and principle to the colonial government that preceded it.

Salient features of HONG KONG Special Administrative Region:

- Hong Kong is enjoying a high degree of autonomy.
- It enjoys and operates under a separate system from mainland China.
- Hong Kong special powers to pass its own law on most matters even including criminal and national security laws.
- Most of the national Chinese laws do not apply to Hong Kong and only the negligent number listed in Annex III of the Hong Kong Basic Law will be applicable.
- As Hong Kong enjoys special privileges, it can administer wide range of ' external affairs' with foreign countries and international organizations with China's concurrence.
- Has its own Court of Final Appeal , which reaches the final decision on cases;
- Uses a separate currency that is not linked to the national currency.

Hong Kong enjoys a separate currency, the Hong Kong dollar and has a separate central bank, the Hong Kong Monetary Authority which is independent in nature and not answerable to People's Bank of China, the China's central bank. Hong Kong has the legal right to levy, collect, spend or invest all the taxes it has collected and do not remit any revenues so

collected to Beijing. Hong Kong being a separate customs territory in international legal terms and was founding member of the WTO. [World Trade Organizations]. Hong Kong enjoys separate membership of Asia Pacific Economic Cooperation. [APEC].

Thus, Hong Kong enjoys a separate legal system, a common law system which is locked in to the international grid.

The openness of the Hong Kong's jurisprudence can be illustrated from a famous Hong Kong case of flag desecration which was decided by the Court of Final Appeal in 1999. There was a public protest in January 1998 where demonstrators displayed a defaced PRC and HKSAR flag. Demonstrators were charged and convicted of the offense of desecrating the national flag and the regional flag.

The main issue of the case was whether such conviction was constitutional under basic law since it was argued that flag desecration was a form of free expression which is legally authorised under Article 19 of the International Covenant on Civil and Political Rights [ICCPR] which has been incorporated as part of Hong Kong's domestic law by Article 39 of the Basic Law. The Hong Kong Court of Final Appeal considered the precedents in the case *Texas vs. Johnson*, 491, U. S 397 {1989}. After considering the majority rationale and opinion, the Court of Final Appeal overturned the Court of Appeal and upheld the original convictions.

In certain cases, Hong Kong Courts have gone beyond the common law in citing regularly decisions of the European Court of Human Rights as a credible authority. For instance, Article 39 of the basic law states that no law

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passed by the legislature of the HKSAR can contravene either the provisions of the ICCPR or the International covenant on Economic, Social and Cultural rights [ICESCR]. In fact, ICCPR has been extended to Hong Kong as a dependent territory of UK and in 1984, UK and Chinese government agreed in the joint declaration that the provisions of ICCPR would apply to Hong Kong post 1997 scenario and the Article 39 of the Basic Law especially underpins that particular treaty provision.[i]

One of the guiding principles in basic law is the Hong Kong's mini constitution which, by Article 39, incorporates as part of Hong Kong's domestic law, the provisions of the ICCPR, which offers the rights of protection. If any provisions which are inconsistent under the ICCPR can not be enacted and, moreover, if enacted, would be dismissed as being unconstitutional by the judiciary invoking Article 39 of the Basic Law.

Some of the salient features of the basic law are discussed as under:

- Offence of treason can be charged only in times of war or at the time of armed invasion and can not be leveled at the time of peace.
- The application of treaty covers only to Chinese national and not to non-nationals living in Hong Kong.
- The offense of failing to report has now been abolished and there is no moral duty of people to report on any people who may be suspected of committing an act of treason.
- The use of serious criminal means or use of force is to be established in the case of offenses of subversion and secession.

- Offense of possession of seditious publications is eradicated as it would negate the individual rights.
- All the journalistic materials are precluded from police power of search and seizure as Hong Kong wants to remain as the media hub and the news hub of Asia-Pacific. Hong Kong government now excluded the police power to search and seizure the journalistic material. As far as unauthorised access to state secret is concerned, the offense would only be committed if criminal means were deployed and any normal investigative reporting would be excluded. For instance, any type of reporting performed by Bob Woodward during the Watergate scandal would be allowed in Hong Kong now.
- All trials under Article 23 offenses would be heard by a jury.
- Now time limit for prosecuting for the offense of handling seditious publication is limited to two years.
- For all Article 23 offenses, the full cover of protection under mini-constitution being the Basic law would apply.
- Hong Kong government is contemplating to abolish the police powers to seize materials and this will restrict the police powers.

PRC constitution has been amended in March 2004 to safeguard by law ownership of private property and to defer monetary compensation if acquisition is made by State any private property.

3. ACCOUNTABILITY OF THE HONG KONG GOVERNMENT UNDER THE BASIC LAW

As per Article 64, Government of SAR is responsible to the legislature.

Hence, the Legislature functions as a check on the executive. The Chief

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Executive has power to refuse or to permit particular individual to offer evidence. No mention of power to demand access to important document has been mentioned in the Articles 70.

As per Article 64 of the Basic Law, government must abide by the law and is accountable to the Legco and must implement laws passed. Government should present regular reports on its function. It must obtain approval from the council for taxation and public expenditure.

Legco on its own authority enact laws in accordance with the Basic law and legal procedures and report them to the standing committee of the National People's Congress for the record and laws enacted by the legislature which are in accordance with the Basic law and legal procedures shall be considered as valid.

The Principal Officials Accountability System [POAS] came into effect on July, 2002 which is a ministerial system that creates a new class of government officials who will be appointed by the Chief Executive with the approval of the PRC and POAS makes it simple for the Chief Executive to dismiss the officials if they perform poorly.

The Chief Executive is selected by a committee of 800 and by about 8.5 million voters of Hong Kong and the Basic Law is interpreted by a political body of the National People's Congress which itself is the product of a one-party state.

Article 68 states that " The ultimate goal is the election of all members and Legislative council of Universal Suffrage.

4. PRINCIPLES OF THE SEPARATION OF POWERS:

In Hong Kong, separation of powers is achieved through three fold ways: The Chief Executive will be responsible to ensure that laws are administered as per basic laws. Government authorities have been delegated power to make sure that the laws are carried out in a responsible way. The legislative council Legco is responsible for framing and enacting the laws. Judiciary is responsible for interpreting the law in case there is any dispute.

The separation of power is the inherent in the design of Hong Kong constitution. As per Prof. Wesley -smith, " The principle of separation of power was not simply an abstract generalization in the minds of framers hence it is inscribed and woven in the document". And from this, it follows that the doctrine of the separation of powers is not just a political or moral idea but it is a legal and constitutional principle. [ii]

Basic law incorporates the principle of the separation of powers: it extends Hong Kong a system of government based on Rule of Law and in extending so, it offers crucial recognition to the primary functions of law making viz. law-executing, law-adjudicating and law-making are to be distinguished from each other and this principle is well laid down into the fabric of the Basic Law. [Lau Kwok Fai, Bernard, 2003].

The main underlying idea behind the separation of power is to segregate powers of government into different institutions so as to prevent any one person or group from acquiring too much power. French Philosopher Montesquieu was the author of the philosophy of segregating the powers of the government in to the following three branches:

- Executive Branch
- Legislative Branch
- Judicial Branch

As per Montesquieu, if the executive and legislative powers are united in the same person or in the same body of magistrates, there can be no liberty as there are chances of apprehension to arise, lest the same monarch or senate should enact tyrannical laws, to administer them in a tyrannical way. Further, there will be no independence if the judiciary power is not separated from the executive and legislative. If all the three powers are vested with a same person or institution, then it will result in a dictatorship form of government. In the main land China, no separation of power system exists as it is viewed that it is against the ideologies of communism.

It is pertinent to illustrate how Chinese system operates. Chinese system does not have separation of power and National People's Congress enacts and interprets law. Under the Chinese constitution, both the national people's congress and its local state authorities are all enjoying more powers. Executive is, in theory, appointed by people's congresses and responsible to them. Further, Judges are also appointed by the People's congress and they are responsible to them.

Some basic Law drafters have suggested that United States is a closer model for Hong Kong's political structure and separation of powers between executive , judiciary and legislative exists with checks and balances between them.

4. 1. CHECKS AND BALANCES ON LEGCO:

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Executive Authorities actions are checked by Legco and they are accountable to the Legislative council. As per Article 64, for all taxation and public expenditure, they must obtain the approval of Legco. As per the Article 35, Judiciary hears cases “ against the acts of executive authorities and their personnel”.

Legislative council is not vested with full powers and its actions are checked by:

- As per Article 49, Chief Executive is vested with the power to refuse to accord his approval for any law enacted by the Legco if the same is not fall in line with overall interest of the region.
- As per Article 50, Chief executive is having power to call fresh elections in case of extraordinary situations.
- Judiciary is vested with powers to repudiate any law enacted by Legco which contravene the Basic Law.

As per Annex I of the Joint Declaration, Legislative Council must be “ constituted by elections” but there is no mention or explanation in the joint declaration about the nature and type of the election. Though the deadline is not yet fixed, the ultimate aim is to elect all the members through universal suffrage.

As per Article 68, the Legislative Council of the HKSAR shall be constituted by election. The modus operandi for forming the Legislative Council shall have to be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. There has

been much controversy on the subject of election of a legislature in drafting stage.

First draft of Basic Law contained four different alternatives was proposed for electing the Legislative Council. During 2004, there had been some progress on the subject and 30 seats were elected directly. It is anticipated that further increase in the directly elected seats is possible in the 2007 election. Further, it is believed that any changes to the election of the Legislative Council would not demand the approval of the PRC.

Chief Executive in his report during April, 2004, to NPCSC had recommended changing the selection process of Chief Executive in 2007 and for the formation of Legislative Council in 2008 so as to enable the constitutional development to move ahead. Chief Executive also recommended nine restrictions on any change including that they must “ aim at consolidating the executive-led system headed by the Chief Executive”.

However, NPCSC declared its decision on the selection of CE and Legco during April, 2004.

- There is no intention to introduce universal suffrage for the election of Chief Executive during 2007 and election of Legco during 2008.
- The existing 50-50 demarcation between functional and geographical constituencies in Legco and splitting voting system in Legco can not be amended.
- The procedural aspect for voting on bills and motions in the Legislative Council shall remain unaltered.

- Other than mentioned above, other changes can be made in 2007 and 2008.

4. 2 CHECKS AND BALANCES IN FUNCTIONING OF JUDICIARY:

In Hong Kong, the legislature conventionally enacts laws and the courts construe and apply the laws in the case before them, guided by certain canons of statutory interpretation. This division is to enhance the doctrine of separation of powers and independence of the judiciary.

Article 88 empowers the Chief Executive to appoint and remove the judges. As per the provisions of the Articles 90, in cases of appointment of judges for Court of Final Appeal and Chief Judge of the High Court, approval from the Legislative Council has to be sought.

4. 3 CHECKS AND BALANCES ON CHIEF EXECUTIVE POWERS:

As per Annex 1, an election committee consisting of only 800 members is involved in the election of the Chief Executive. Under the provisions of Article 52[2], Legislators can compel the Chief Executive to resign by passing a bill if he refuses to accord his approval for any bill passed by the Legco. As per the provisions of the Article 73 {9}, an investigation can be ordered against the Chief Executive and it will be chaired by the Chief Justice and legislators can bring impeachment process for the ouster of Chief Executive . In the case of investigation by the Chief Justice, his actions can be questioned and is subject to the scrutiny by the courts.

As far as Chief Executive power is concerned , there in no mention in the Basic Law that Hong Kong is to be administered by the “ executive -led

political structure' whereas the intention of the Basic Law drafters was clear to tooth him with greater power than the branches of Hong Kong's political structure. It is to be noted that the role and power of the Chief Executive is more or less identical to the Governors appointed by the British before 1997.

The Chief Executive is elected through the elections or consultations held locally and his appointment is made by the Central People's Government in Beijing. However, the ultimate aim is to elect the Chief Executive through universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures but no dead line is fixed for this.

The first Chief Executive was elected by a 400 -member selection committee in 1997. However, Annex I emphasis that future Chief Executives be selected by an 800 member election committee. Further , Annex I permits the method of selecting the Chief Executive to be modified for terms subsequent to 2007 , if there is need to do so. In such case, if the method of selection of Chief Executive is to be changed, then such proposal should be ratified by two-thirds majority of all the members of the Legislative Council and with the consent of the Chief Executive and it has to be reported to NPCSC for its approval.

5. PROPOSALS OF HONG KONG GOVERNMENT FOR THE 2007 -08.

Under Article II, with the basis that the 1st Clause of the of the NPCSE April 2004 are not dishonored, specific methods of election of Chief executive and Hong Kong SAR in 2007 and the formation of Legco in 2008 could be tentatively altered under the principles of gradual and orderly progress and <https://assignbuster.com/hong-kong-constitutional-law-essay-sample/>

in accordance with the provisions of clause 45 and Clause 68 and the Clause 7 of the Annex I and the Clause 3 of the Annex II of the Basic Law of the Hong Kong SAR.

Proposal by the Hong Kong government is not free from the criticism and especially pro-democracy camp vehemently criticizing the Hong Kong Government's proposal as it has not come out with clear time table for universal suffrage and has also made objection for the efforts to create new functional constituencies.

6. THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE LEGISLATURE:

The relationship between the executive and the legislature in HKSAR is of check and balances and mutual co-operation. Accordingly, Legco is efficiently applying the check and balance function. Legco continuously perform the checking functions on the executive branch and in some cases Legco even condemned the government officials seriously.

But in reality, the bill presented by the administration and about 90% of these bills was passed with or without amendments. In case there were divergent views, it will be withdrawn pending further consultations. It is a rare picture for a bill to be voted down. For instance, in the past seven years, even single bill has been voted down. It is worthwhile to mention that even controversial bill which aimed to amend the Article 23 of the Basic Law was not voted down. The bill was allowed to lapse at the end of the Legco's last term after the Administration decided not to continue second reading debate on the bill.

It does not mean there existed perfect understanding between two branches of Legco but the black sheep is the press as it has failed to give more coverage for sensitive issues that is being discussed in the Legco. Due to non availability press criticism and wide propaganda on the issues that were tabled on the Legco, serious issues were not brought to the attention of the gullible public. For instance, there was no coverage at the entire Companies [Amendment] Bill, though the bill would affect Hong Kong's economic atmosphere and have long term consequences.

There seems always difference of opinion simmering between legislatures and executive authorities because Government officials were appointed whereas the legislatures were elected. The experience and background of these two groups tend to differ. In case, if the administration wants support of the legislatures, the government has to lobby with them and extend good rationale why they should support the government.

Under British controlled Hong Kong, the legislatures were nominated. But under present regime, though the Administration had the power to introduce the policies and bills but doesn't have any voting in the Legco. A peculiar situation exists today that ' the government had the power but no votes whereas the legislatures had the vote but no powers'. This is creating some strain in the executive-legislative relationship.

Further in making a decision how to vote, a legislature has to regard the interest of the party to which he is affiliated and his constituency. In main land China, a legislature can not question the high rank of the government . Whereas in Hong Kong, legislatures were safeguarded by the Power and

Privileges Ordinance. If a Legco plays tough with officials and fellow members, it is regarded that the legislatures need not have to pay any price, and in such cases, legislatures naturally gain political advantage.

If a party blindly supports the administration, then it may lose the trust of public. For instance, Democratic Alliance for Betterment of Hong Kong [DAB], people were of the view that it supported the government blindly and hence, it had loss of the trust of public.

In rest of the world, ruling party would assist its members to fulfill its electoral promises. Whereas the Hong Kong government is believed to be politically unbiased and could not help any particular party.

The parties do not involve in any formulation process or decision-making effort of the Government policies. The power to formulate policy remained in the hands of the civil service and the principal officials. Hence the parties were put in a situation to support the government without any reward.

Previously, some members were acted in dual capacity both as Executive Council member and Legislative Council member. But during the regime of Chris Patten, the pattern was changed and Legco and ExCo were separated and it was made clear that the Executive Councilors need not required to defend government policies. The onus was placed on officials who were in charge of those policies to shield them. The task of implementing and defending the HKSAR policies still reposed on principal officials and their teams of senior civil servants.

As elsewhere, there exists no ruling and opposition party in HKSAR. Hence, in HKSAR, a legislature could become more admired, if he strongly criticises the policies of the government and hence, in most occasions, legislatures were therefore to carry out the role of permanent opposition.

In Hong Kong, the system of political parties is yet to take its mature shape. As per HKSAR law, the Chief Executive should not have any party affiliation. If the Chief Executive selects some members of a political party as principal officials, they have to resign from the party membership to exhibit that they are neutral. Further, the financial sources of a political party need not to be disclosed. As the political parties system is immature in nature, they do not have credible or comprehensive plans for the administration of Hong Kong.

As the party system is not yet allowed in Hong Kong, many talented youngsters are not interested in becoming leaders and principal officials. It is being criticized that HKSAR is suffering from a lack of political leadership both in executive and legislature as well. (Mrs. Rita Fan, 2004)

7. CONSTITUTIONAL CONVENTIONS AND HKSAR

Constitutional convention means politicians discuss, debate and deliberate amendments to the existing constitution of a country. In between 1987 and 1988, some political parties felt that it is essential to discuss the future path of the political reform in HKSAR. Though, some legislators and political parties tried to reach a compromise on a political model for the basic law and to introduce universal suffrage or direct election to Legco.

Unfortunately, these constitutional conventions were neither supported nor endorsed by the main land Chinese government. Under the Basic Law, the HKSAR is enjoying a degree of autonomy. For instance, at the District level, members could select number of members of sub-committee and co-opt members without reference.

There is an urgent need for the structuring of constitutional convention in Hong Kong due to following reasons:

- As the existing HKSAR constitution is outdated, potentially authoritarian polity and semi-colonial, it has become necessary to empower citizens of Hong Kong for the reform to be carried out in this regard.
- Effective of functioning of Basic Law can be achieved with the involvement of all politicians in the constitutional conventions.
- It is essential for the HKSAR to construct its own brand of democracy possessing the potential to develop additional checks and balances.
- HKSAR is to preserve the conventional laissez-faire administration as regards to the rights of its citizens while PRC maintains its policy of minimal interference in HKSAR decision making process.
- To abstain from deferring to Main land China and to construct its own concept of ' One Country, Two Systems ', in such a way that the sovereignty of ' One Country' is recognized and the ' concept of two system' is preserved.
- On the part of the Chief Executive, he should see that the legislative bills are passed without any unnecessary interference and he should take the opinions of all the political parties on his policies.

- Legco should encourage the legislators to place private bills if it confirms to the Basic Law. [Sonny Lo, 2003].

8. SOME IMPORTANT CASE LAWS CONCERNING THE HKSAR'S BASIC LAW:

- In *HKSAR v Ma Wai Kwan David*, the Court of Appeal ruled that the NPC is entitled to make any laws or decisions affecting Hong Kong even those laws or decisions are inconsistent with the Basic Law.
- *Yeung May -Wan & Others v HKSAR (Falun Gong Cases)* - Members of Falun Gong staged a protest and all protestors were charged with obstruction of a public place thereby contravening s 4A of the Summary Offenses Ordinance and the CFA ruled that all convictions were squashed against the Falun Gong Followers.
- In *HKSAR v Ma Wai Kwan David*, Chief Justice Chan ruled that the Basic Law is the constitution of the HKSAR. On the other hand, he also minimized the status of the Basic Law by holding that the sovereign can do any act and the courts cannot ever question them.
- In *Ng Ka Ling v Director of Immigration*, it was concluded that the mainland legislation in certain circumstance could not be enforced in Hong Kong. In other words, any mainland law which is inconsistent with the Basic Law or its procedure could not be enforced in HKSAR. The CFA, in *Ng Ka Ling*, held that it has the power to determine the validity of any act or decision of the NPCSC. The CFA also expressly indicted that its jurisdiction is derived from the Basic Law.

9. CONCLUSION:

Joint Declaration has not covered two main areas namely the relations between the Central Authorities and the HKSAR and the political structure of the HKSAR and these areas are ambiguous and remain unsettled. The Basic Law should establish the relationship between the Central Authorities of the PRC and HKSAR . The independence of the HKSAR, courts and the extent of their constitutional jurisdiction is vogue.

Another peculiarity is that when a case comes to Court of Final Appeal [CFA], Court can not interpret certain provisions but must refer them to the Standing Committee of National People's Congress [NPCSC] and then apply that interpretation to the facts of the case.

Majority in Hong Kong thinks that the Basic Law is the legal guarantee of their autonomy and rights of the capitalist economy and an independent judicial system. But the main land China views the judicial review of legislation in HKSAR as opposed to the communist policy. The Government of the HKSAR, judiciary and legal professions, with the cooperation of the NPCSC, is in urgent to work out some principles and rules for interpreting the Basic Law.

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[ii] Prof. Wesley-Smith, " In " Executive Order and the Basic Law "(Law lectures for practitioners } 1998, 187.

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