

PCLL Conversion Examination
January 2019
Examiner's Comments
Hong Kong Constitutional Law

I make the following comments on the examination in Hong Kong Constitutional Law and some observations on the examination scripts of candidates which I graded.

Question 1

This question required candidates to consider the constitutionality of a fictitious proposal of the central peoples government (CPG) of the PRC to create a new international commercial court in Hong Kong. The question also raised an issue about the powers of the CPG and also the government of the Hong Kong SAR to designate parts of Hong Kong as being part of Mainland China. This has been a topical matter in light of the recent opening of the new West Kowloon train station and on-going litigation in connection with parts of the station being treated as part of Mainland China.

Candidates were expected to address the various elements of the proposal for a new international commercial court and discuss the extent to which they could be incompatible with the Basic law. For example, the Basic law provides that legal cases in Hong Kong should be determined by Hong Kong courts according to Hong Kong law under the common law system. The only exception to this is cases raising matters of foreign affairs or acts of state.

The proposal interferes with this arrangement in material respects: for example, the new court was to have its own judges appointed by the CPG; the law to be applied by the new court was not the common law of Hong Kong; and appeal rights from the court were to be to the Supreme People's Court.

The best answers to this question systematically considered the various elements of the proposal and identified where they were not consistent with the Basic law. These answers then made clear that article 73 of the Basic law restricts the powers of the Legislative Council not to do anything which breaches the Basic law. Accordingly, only a new law made by the National People's Congress (NPC) giving effect to the proposal and applied to Hong Kong would allow the proposal to be effective.

This conclusion then presented the issue of the powers of the NPC to derogate from or amend the Basic law. The recent controversy associated with the new West Kowloon train station throws some light on these matters and, just before Christmas 2018, the Court of First Instance rejected a judicial review claim in *Leung Chung Hang Sixtus v. President of Legco* [2018] HKCFI 2657 in which the arrangements at West Kowloon were challenged as being contrary to the Basic law.

The best answers discussed this case and highlighted why the more radical elements of the proposal for a new commercial court in Hong Kong might not be upheld as lawful. In particular, the proposal fundamentally challenged the underlying constitutional values of the Basic law, such as preserving the role of Hong Kong

courts and the common law system, rather than simply re-designating a parcel of territory in Hong Kong for limited immigration law purposes.

The main weakness in poorer answers was a failure to discuss recent events in Hong Kong associated with the West Kowloon controversy. Candidates who failed to discuss either the West Kowloon matter or the recent litigation about it, scored poorer marks.

Question 2

This question first required candidates to consider the nature and extent of the protection of human rights in Hong Kong. The question then required candidates to consider the scope for remedies for alleged breaches of human rights where both the Hong Kong SAR government and government bodies in Mainland China might be involved in the alleged breaches. The main difficulty with this second matter was the operation of immunities from liability and the potential interaction of Hong Kong law with the doctrine of act of state, which under the Basic law is governed by Mainland law.

Candidates were expected to identify the human rights which were potentially breached, for example, the right to liberty, freedom from arbitrary detention and the right to property. Candidates should have explained that the source of human rights in Hong Kong is the Basic law itself, the Bill of Rights Ordinance (BORO) and the common law itself. As far as human rights under the Basic law and BORO are concerned, it is well established that, in practice, many human rights can be subject to limitations under the principles of proportionality; that is, where the government must impinge on fundamental rights so as to pursue a legitimate aim so far as it is strictly necessary to do so.

Proceeding on the basis that fundamental human rights had been breached in this case and that the breaches could not be justified (on which matter there was insufficient information), the next issue was what remedy was available. While the common law system does not tolerate breaches of rights without legal remedies, it is also the case that governments have certain immunities from liability. In some cases, the Hong Kong government has immunities under the Crown Proceedings Ordinance, though these are unlikely to apply in this case. In so far as any Mainland China authorities were involved, it is possible that the Hong Kong courts would not have jurisdiction over them. For example, under the garrison law which is applied to Hong Kong by Annex III of the Basic Law, remedies against some tortious acts committed by the PLA in Hong Kong must be pursued in the Supreme Peoples Court.

More generally, it is very likely that the act of state doctrine would be invoked, in which case the ultimate legality of activities of Mainland bodies would be determined by the Standing Committee of the National People's Congress under the procedures in article 158 of the Basic law.

The best candidates systematically discussed the human rights issues in this case and identified the potential difficulties with obtaining legal redress, notably the potential

effects of the garrison law and, more significantly, the implications of the act of state doctrine.

Most candidates were strong on discussing the human rights aspects of the problem, including the meaning and effect of the doctrine of proportionality. However, most candidates failed to engage with the difficulties in obtaining remedies from the Hong Kong courts if, as was alleged, any Mainland China government bodies or agencies were involved. In the first place, very few candidates identified the potential effect of the garrison law in the event that allegations were to be made against the PLA. Few candidates picked up on the obvious problem that the Hong Kong courts would not normally have jurisdiction over events occurring in Mainland China. The weakest candidates did not discuss remedies issues at all, although it is reasonably clear that on the facts, the act of state doctrine could be invoked by some potential defendants in defence of any claim. In contrast, stronger candidates mentioned the implications of the act of state doctrine and that, although the matter is not completely settled, it is likely that under the Basic law the doctrine is governed by PRC law.

Question 3

This question called for a detailed consideration of article 158 of the Basic Law and the interaction of the power of interpretation with the role of HK courts in deciding cases. The best answers systematically considered the five occasions when the Standing Committee of the National People's Congress has exercised the power of interpretation and compared these occasions with the Hong Kong CFA's approach to the power, notably in *Ng Ka Ling* but also in later cases, in a particular the Congo case.

The best answers discussed some of the recent cases on article 158 when it has arisen before the Hong Kong courts, e.g. *Yau Wai Ching*. Weaker answers only focused on *Ng Ka Ling* and made no mention of its application in later cases.

Weaker answers also failed to set article 158 and the power of interpretation in the context of the constitutional law of the PRC. Stronger answers noted that there are fundamental differences in understanding between the PRC and common law approaches to interpretation and adjudication, and that this is a potential weakness in the Basic law's guarantees.

General Comments:

Three general comments must be made on the exams.

First, some candidates, as in previous years, did not answer all of the questions, or only focused on one aspect of a question. This inevitably means that marks are lost, as a result of incomplete answers.

Secondly, some of the questions in this exam focused on different areas of Hong Kong constitutional law than has been the case in recent exams. It was apparent that some students had not fully prepared from the full range of the course syllabus. As

always, it is unwise to proceed on the basis that previous years' examinations are a complete guide to what a future examination will test.

Thirdly, it was clear that many candidates had not informed themselves about recent developments in Hong Kong constitutional law. It is important, particularly in this subject, to keep up to date with current issues and recent case law in Hong Kong in order to prepare fully for the examination.