

PCLL CONVERSION EXAMINATION JANUARY 2019

Title of Paper: Hong Kong Constitutional Law
Date: 3 January 2019
Time: 2:30 p.m. – 2:45 p.m. (Reading Time)
2:45 p.m. – 4:15 p.m.

Instructions

1. Write your **candidate number** on the cover of each answer book. Do **NOT** write your name in the answer book.
2. Start each answer on a separate page of the answer book.
3. Write your answers only in the answer books provided.
4. This is a one and a half-hours examination.
5. This is an open book examination.
6. Reading time for this paper is 15 minutes. Do **NOT** begin writing in your answer books during this period until you are instructed to do so.
7. This paper consists of 4 pages, including three questions. Candidates are only required to answer **TWO** questions of three. A total of 100 marks may be awarded.
8. Each question is worth 50 marks.
9. The passing mark for this paper is 50 marks.

**DO NOT OPEN THIS QUESTION BOOK
UNTIL YOU ARE TOLD TO DO SO**

PCLL Conversion Examination January 2019

Hong Kong Constitutional Law

Question 1 (50 marks)

The Government of the People's Republic of China ("the CPG") has decided that there is a need for a specialised commercial court in Hong Kong to deal with disputes connected with trade and investment taking place as part of the 'One Belt, One Road' initiative. A proposal has been agreed between the CPG and the Government of the Hong Kong Special Administrative Region ("the SAR") for the establishment of this new International Commercial Court of Hong Kong ("ICCHK") to be located in a building in Central, Hong Kong. It is intended that the ICCHK will start hearing cases from 1 July 2019, assuming that the Hong Kong Legislative Council enacts the necessary measures to implement the proposal.

Among the features of the proposal for the new ICCHK are the following:

- (i) The judges of the ICCHK will be jurists of the highest reputation approved by the National People's Congress ("NPC") to sit in the ICCHK. These judges will be a combination of judges, professors and distinguished lawyers from China and other jurisdictions. The SAR government has already indicated that a former Lord Chief Justice of England and Wales has agreed to be the President of the new ICCHK.
- (ii) The law to be applied by the new ICCHK will be the laws passed by the NPC to govern 'One Belt, One Road' matters. The proposal makes clear that no rules of Hong Kong law will apply to cases to be decided by the ICCHK.
- (iii) The judges of the ICCHK will be appointed by the CPG for renewable terms of three years. They will have absolute immunity from any legal claims connected with or arising from their role as judges of the ICCHK.
- (iv) There will be an exclusive right of appeal from the ICCHK to the Supreme People's Court in Beijing.
- (v) All proceedings of the ICCHK will be secret. No reports of the ICCHK cases or judgments will be published and all ICCHK cases will be heard in private.
- (vi) The law of the People's Republic of China ("PRC") will apply to the five storey building in Central which will be the location of the new ICCHK. The proposal makes clear that the building will for all purposes be deemed to be part of mainland China and not part of the territory of the SAR.

The ICCHK proposal has met with strong opposition in Hong Kong from law makers in the Legislative Council and many Hong Kong lawyers. A judicial review claim challenging any legislation implementing the proposal has been threatened. Some lawyers have said that the Legislative Council has no power under the Basic Law to pass legislation on this subject. Meanwhile, the SAR government has defended the proposal as being necessary to allow the Hong Kong legal system to compete with other international commercial courts which are being established elsewhere in the world, including in Shenzhen.

You are a trainee at a large international law firm in Hong Kong. The senior partner of the firm has asked you to write a memorandum explaining whether the proposal for the ICCHK raises any problems of constitutional law in Hong Kong. If so, you are asked to make clear what these are, specifically explaining the provisions of the Basic Law which might present problems for the ICCHK proposal and how, if at all, any such problems might be addressed by the SAR and the CPG.

Question 2 (50 marks)

Marty Leung and his wife Jenny Lo are artists who live and work in Hong Kong. Marty is a Canadian citizen who also holds a Hong Kong SAR passport. Jenny is a citizen of the People's Republic of China.

Marty's and Jenny's art concentrates on landscape paintings of beautiful locations around the world. In February 2018 the apartment in Wan Chai where Marty and Jenny live and work was burgled while they were sleeping. The next thing that Marty and Jenny remember after being woken up by the burglary is finding themselves in prison cells. For five days they were kept in solitary confinement, deprived of sleep and interrogated about their political views and what they intended to achieve with their 'cartoons'. At the end of the fifth day, they were released and reunited, and taken to a hotel near Wuhan. They were told that they were free but could not leave the hotel grounds until arrangements were made for their return to Hong Kong. Two weeks later, they were taken to Wuhan airport, from which they flew back to Hong Kong.

Marty and Jenny now think that they have been mistaken for their friends, John and Mary Leung, who are well known Hong Kong caricature artists and cartoonists who also live and work in Wan Chai. John and Mary publish their highly political cartoons in newspapers and magazines in Hong Kong and internationally. Their cartoons often portray Hong Kong and Chinese political figures in a comical light, making fun of them and usually making strong political points at the same time. John and Mary have often said that they worry about attracting adverse attention from the authorities and whether there will be any action against them for their works.

Marty and Jenny are very upset about what they consider was their wrongful abduction from Hong Kong and unlawful detention in mainland China for nearly 20 days. They are also angry that after they telephoned their son on the day they arrived in the Wuhan hotel, his complaints to the Hong Kong police about his parents' abduction from Hong Kong were not pursued by the police or the Hong Kong government. For its part, the Hong Kong government now says that it was "investigating matters in co-operation with the mainland authorities but, happily, before the investigations were concluded, Marty and Jenny had returned to Hong Kong".

Marty and Jenny are now seeking advice from the law firm where you work about bringing a legal action in the Hong Kong courts, claiming damages for their abduction and wrongful detention. They want to sue the Liaison Office of the Central People's Government, as the representative of the mainland government in Hong Kong, and also the Hong Kong SAR government. They allege that they were abducted and detained by agents of the PRC government and that the Hong Kong SAR government did not do anything to secure their release.

The partner for whom you work in the law firm has discussed Marty and Jenny's case with you. She acknowledges that there are some evidential difficulties but, as a preliminary and proceeding on the assumption that officers or agents of the PRC government, or the Hong Kong government, were involved in the matter, she asks you to draft the legal advice on the constitutional law aspects of the case.

Accordingly, write the legal advice on the constitutional law aspects of Marty and Jenny's case.

Question 3 (50 marks)

"The central problem with the 'One Country, Two Systems' arrangement is the different understandings which Hong Kong and mainland Chinese lawyers have of "interpretation" of the Basic Law and "adjudication" by the Hong Kong courts under the Basic Law. In particular, too many Hong Kong lawyers fail to understand that the Basic Law always gives priority to the power of the Standing Committee of the National People's Congress ("SCNPC") to interpret the Basic Law, including interpreting the provisions governing areas in which Hong Kong enjoys a high degree of autonomy".

Discuss this statement, supporting your view of its accuracy or inaccuracy by reference to the application of the Basic Law since 1997.

~ End of Examination Paper ~