

PCLL CONVERSION EXAMINATION JUNE 2018

Title of Paper: Hong Kong Constitutional Law
Date: 20 June 2018
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 four 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 June 2018

Hong Kong Constitutional Law

Question 1 (50 marks)

Under the principles of “one country two systems” and the Basic Law of the HKSAR, the Central Authorities still hold some important powers over the Region.

- 1. Identify the powers belonging to the central authorities; (15 marks)**
- 2. Discuss the nature of these powers according to the constitutional needs to uphold the sovereignty of the Central Authorities; (20 marks)**
- 3. Evaluate the exercise of these powers by the Central Authorities on how far the maintenance of the high degree of autonomy of the HKSAR has been affected and suggest any possible remedies available to the HKSAR. (15 marks)**

Question 2 (50 marks)

Recently, at various public gatherings, demonstrations and public forums, a group of youngsters stood up to declare they are not Chinese, and shouted slogans that made many people uncomfortable, such as “Chinese people go back to China”. They have been supported by some people including scholars. However, there is no tangible evidence proving they are conducting actions or activities aiming at actively challenging the authority of the Government of the HKSAR or obstructing its operation.

On the other hand, some people including pro-establishment politicians have called for strengthening the direct control over the HKSAR by the Central Authorities, and legislating to implement Art 23 of the Basic Law in order to safeguard national security.

In a recent session of the National People’s Congress (the NPC) held in Beijing in March, Mr. Wong, a deputy to the NPC from the HKSAR delegation, moved a motion requesting the Central People’s Government (the CPG) to order the Government of the HKSAR to consider enacting an Ordinance to implement Art 23 of the Basic Law. In His speech, Mr. Wong referred to the incident mentioned above.

Shortly after the end of the session, the CPG instructed the Chief Executive to follow up the motion on the ground that there is an actual and pressing need for the legislation in Hong Kong.

The Secretary for Justice invites you to advise him on the CPG’s instruction and the way forward. Please prepare the memorandum.

Question 3 (50 marks)

The understanding of the jurisdiction of the HKSAR courts was controversial in early cases such as *David Ma* (1997) and *Ng Ka-ling* (1999).

In *HKSAR v Ma Wai Kwan, David* [1997] 2 HKLRD, pp.780-1, the Chief Judge of the Court of Appeal (CA) stated that:

“I would accept for the arguments put forward by Mr Fung, SC, that regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign. There is simply no legal basis to do so. It would be difficult to imagine that the Hong Kong courts could, while still under British rule, challenge the validity of an Act of Parliament passed in U.K. or an act of the Queen in Council which had effect on Hong Kong. However, I cannot find any authority which prohibits the Hong Kong courts to at least examine whether such legislation or imperial act existed, what its scope was and whether what was done in Hong Kong was done in pursuance of such legislation or imperial act. In fact, it is, in my view, the duty of the Hong Kong courts to ensure that the legislation or imperial act is implemented and if there is to be any query about it, the courts should conduct such an enquiry.”

The constitutional jurisdiction of the courts has also been affirmed by the Court of Final Appeal (CFA), in a different tone, in *Ng Ka Ling v Director of Immigration* [1999] 1 HKC, P.332-333, in the following terms:

“The Region is vested with independent judicial power, including that of final adjudication. Article 19(1). The courts of the Region at all levels shall be the judiciary of the Region exercising the judicial power of the Region. Article 80.

In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. ...

What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its Standing Committee (which we shall refer to simply as “acts”) are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.” [Emphasis added for the purpose of examination]

1. **Identify the differences in defining the jurisdiction of the HKSAR courts by the Court of Appeal and the Court of Final Appeal;** (15 marks)
2. **Explain why the Court of Appeal believed that “regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign”;** (15 marks)
3. **Based on the above two cases as well as other related cases, explain how and to what extent the principle of judicial independence of the HKSAR courts has been entrenched as a constitutional principle.** (20 marks)

~ End of Examination Paper ~