

PCLL Conversion Examination

January 2011

Examiner's Comments

Hong Kong Constitutional Law

Question One

Students are expected to:

- A. Discuss why the Basic Law (BL) is a piece of national law and a constitutional law. **(25 marks)** To understand and support this thesis, the discussion should cover: (a) the hierarchy of the BL in the Chinese law system; (b) the making process of it; and (c) the effect of it.
- B. Discuss why the BL is the constitution of the Region. **(25 marks)** The focus should be put on: (a) the legal status of the BL in HK legal system; (b) BL as the basis of judicial review; (c) It is supported by the case law - the courts of HK have confirmed the conclusion in their judgments.

The overall performance of students who answered this question was not satisfactory. Many focused on the BL as a constitution of the region while putting little emphasis on the BL as a national law. In dealing with these two central aspects, many could not formulate a logical and coherent answer. A few of them even completely shifted the focus onto the case *Ng Ka-ling* and its importance, and/or argue the de/merits of the interpretation by the NPCSC.

Question Two

Basically, students are expected to demonstrate a thorough understanding of the Basic Law in respect of the relationship, and the division of powers between the central authorities and the HKSAR. In the answer, they should be able to:

- A. Identify the legal status of the HKSAR (arts. 1, 12) and explain the relationship between the central authorities and the HKSAR; **(10 marks)**
- B. Understand the theory of separation of powers under the principles of “one country two systems” and “high degree of autonomy”; **(10 marks)**
- C. Identify the powers to be enjoyed by the central authorities and the HKSAR respectively based on the Basic Law:

- a. Six major aspects of powers to be enjoyed by the central authorities: **(15 marks)** – (a) Responsibilities of the Central People’s Government (CPG) for the Foreign Affairs and the Defence; (b) Power to Appoint the Principal Officials of the Government of the SAR by the CPG, including the Chief Executive and the principal officials of the executive authorities; (c) Application of national laws to the HKSAR by the Standing Committee of the NPC (“the NPCSC”) by way of amending the list of national laws in Annex III of the Basic; (d) Review of constitutionality of local legislation by the NPCSC; (e) Interpretation of the Basic Law by the NPCSC; (f) Amendment of the Basic Law by the NPC.
- b. Four major areas of autonomous powers, with necessary explanation and citation of the relevant provisions of the Basic Law: **(15 marks)** – (a) Executive power; (b) Power to conduct external affairs; (c) Legislative power; (d) Independent judicial power, including that of final adjudication.

The purpose of this question is to test students’ general understanding of the BL and in particular, of the relationship and division of powers between the HKSAR and Beijing – Central Authorities. It was supposed to be an essay question because it required a good and thorough reading of the BL. However, it turns out that the overall performance was far from satisfactory and students often failed to identify the powers of the central authorities and the autonomous powers of the HKSAR, or partially succeeded. Many, if not majority, of them forgot to answer the question of the “relationship” between the HKSAR and Beijing by referring to the relevant articles of the BL. A number of students didn’t understand the requirement of the question rightly, and gave a wrong answer to it.

Question Three

The question aimed at testing students’ understanding of constitutional theory/doctrine in respect of constitutional jurisdiction of the HKSAR courts – a fundamental issue of constitutional law of Hong Kong. Students are expected to have a good understanding of the case law concerned, too.

Students are expected to:

- A. First, identify the scope of constitutional jurisdiction based on the two cases; **(20 marks)**

B. Discuss the constitutional basis with reference to the theory (rule of law, constitutionalism, common law tradition, and judicial review practice) and the relevant provisions of the Basic Law such as arts. 19 and 81; **(20 marks)**

Argue why the CFA found the Court of Appeal's conclusion "wrong". Students must assess the merits and/or demerits of this position, and give their own opinions on this point [note: this could be "agreement" or "disagreement"], and support the opinion with arguments and justifications by referring to the authorities. **(10 marks)**

Students could either answer to the sub-questions A and B in sequence, or combine the answers to sub-questions A and B as long as they are able to deal with all issues such as jurisdiction, constitutional theory/doctrine underlying the decisions, and merits or demerits of *NG*.

The performance is generally good but not very satisfactory. The insufficiency or defects are manifested in the following way: many of them could not identify the full scope of constitutional jurisdiction of the HKSAR courts based on the two judicial decisions and the BL, while others failed to state / restate the supporting doctrine / theory - rule of law, constitutionalism, common law tradition, and judicial review practice, or did it partially or piecemeal. When arguing why the CFA found the Court of Appeal's conclusion "wrong", students confined themselves to reciting the CFA's opinion, without carefully examining if / why the opinion itself was right / wrong.

Question Four

Part A of the question obviously aimed at testing students' ability to apply the BL and case law to defend new cases in front of them. Students are expected to understand these leading cases and the rationale/doctrine underlying the decisions.

Part B aimed at examining students' knowledge in respect of the legislation to implement Art. 23 of the BL, and mostly importantly, at testing students' ability to argue about controversial constitutional issues and to advocate their own positions.

Students are expected to:

A. First, apply *Ng Kung-siu* (decided by CA, 1999, or CFA, 1999, or both), *Leung Kwok Hung* (CFA, 2005), or any others, to the case, and argue why Henry and Kathy are not guilty, why the fundamental freedom of expression should be guaranteed, and whether the ways of expression (defacing the portraits and desecrating the flag) are appropriate in HK; **(20 marks)**

- B. Then, prepare the memo in which students should deal with:
- a. The understanding of the art. 23 and the appropriateness of the Instructions given by the State Council; **(10 marks)**
 - b. The necessity of legislation to implement the article; *or* unnecessary of such legislation; **(10 marks)**
 - c. How to effectively protect national security and national interests under the Basic Law with *or* without such a legislation. **(10 marks)**

Not a majority have chosen this question which was probably difficult to many. The performance was fine. Nearly all of them knew those leading cases, and based on which and on the relevant articles of the BL such as arts. 27 and 39, held why Henry and Kathy were not guilty. The problem with the answer was that it often lacked in-depth analysis and criticism, supported by a thorough understanding of the importance of human rights protection in HK.

This observation applied to the sub-question B too. The answer and comment looked very superficial. Many of them were not be able to support their ideas with relevant domestic and international instruments and arguments. Some answered it very, or too briefly (probably time was running out – this revealed the problem of time management).