

PCLL Conversion Examination

June 2011

Examiner's Comments

Hong Kong Constitutional Law

General Requirements: There are three questions and students are expected to answer any two of them. Each question is worth 50 marks. A total of 100 marks may be awarded. The passing mark for this paper is 50 marks.

Question One

Students are expected to:

A. Understand the origin and drafting history of the Basic Law (BL). **(10 marks)**

For example, they can describe how the question of Hong Kong was raised, how the negotiation between British and Chinese governments proceeded, and the status of the Sino-British Joint Declaration as the source of the BL.

B. Discuss why the Basic Law (BL) is a national/domestic law. **(20 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.

C. Discuss why the BL is the constitution of the Region. **(20 marks)**

The focus should be on: (a) The legal status of the BL in the HK legal system; (b) BL as the basis of judicial review; (c) The case law - the courts of HK have confirmed the conclusion in their judgments.

The general performance of students who have chosen this question is not satisfactory. The intent of this question is to test students' understanding of the status and effect of the BL in the HK and PRC legal system.

Thanks to the case law such as *Ng Ka-ling*, many can tell the BL enjoys the status of constitution in HK, and in the meanwhile, believe it is still debatable considering the different opinions held by some Chinese scholars. However, as to "international" and "domestic" dimensions, many misunderstand them and extensively state the functions and/or contents of the BL. For example, they either answer "international" dimension of the BL by stating the capacity of the HKSAR government to conduct "external affairs", or believe "international" dimension refers to the relationship between the HKSAR and the PRC (which is completely wrong). They treat "domestic" dimension from the perspective of separation of powers of the HKSAR government, or autonomous regime.

Question Two

Basically, students are expected to demonstrate a thorough understanding of the human rights law regime in HK, especially insofar as the freedom of expression is concerned.

In the answer, they should be able to:

- A. Expound the significance of the human rights protection in HK, and especially, explain why freedom of expression “is a fundamental freedom in a democratic society”. **(10 marks)**
- B. State how the Basic Law, the Bill of Rights Ordinance as well as the international bill of human rights effectively protect the freedom of expression of the HKSAR residents. **(10 marks)**

Students are expected: (a) to cite/refer to the relevant articles of the BL and the Bill of Rights Ordinance; (b) to understand the application of the international human rights instruments in HK via article 39 of the BL, with the support of case law; and (c) to discuss their implementation in the courts.

- C. Explain why freedom of expression could be restricted based on the BL, int'l instruments and case law (*Ng Kung-siu*, for example). **(15 marks)**
- D. Further, explain how in adjudicating disputes in respect of freedom of expression, the courts could apply the following tests to guarantee as much as possible the freedom of expression enjoyed by the residents: legality test, legal certainty test, proportionality test and necessity test. In this part, students should cite relevant judicial decisions. **(15 marks)**

Generally speaking, students have a good understanding of the question and can answer it in a satisfactory way. It is “satisfactory” in the sense that they can either cite the law including case law, or cite and apply the widely recognized tests. However, not anyone can state and apply statute law and case law in a lucid, logic or well-structured way, or cite and apply all the tests as applied in practice.

Question Three

Students are expected to:

- A. State the rationale and justification of the survival of the ancient common law doctrine of Crown immunity in Hong Kong after the handover of sovereignty in

1997. **(10 marks)** [Students can adopt the court opinion or comment/criticize it. Students can argue it based on the articles 8 or 19 of the BL.]

- B. Explain whether the right to immunity should be transferred to the new sovereign power, the PRC, acting through the CPG and its instrumentalities, and why. **(15 marks)**
- C. Explain whether a party can or cannot lodge a civil claim before the Hong Kong court against a Chinese state entity engaging in commercial transactions, and why. **(10 marks)** Students may approach it in a comparative manner by referring to other jurisdictions.
- D. Clarify whether the right to immunity may or may not restrict the jurisdiction of the courts of the HKSAR, and how. **(15 marks)** Students should comment on the impact and the consequences of the decision.

This is a rather difficult question. Students are expected to adopt the court opinion with further explanations, or differ from the court opinion with ample arguments. As principle, students have been given freedom to express their own views to respond to the sub-questions as long as they are able to argue and justify with doctrines, reasons and insightful opinions.

There are only a small number of students who have chosen this question. The requirement to answer each of the sub-questions is very clearly stated. However, the problem with the answer is that: the students either answer it on a hearsay basis, which means they aren't really aware of what have actually happened in court and don't understand the related issues, or answer it in a very abstract way without justifications based on doctrines, reasons and insightful opinions. Some just comment on the "Congo case" [I guess they are more familiar with Congo case because it was just decided recently] believing the two cases are relevant or identical to each other, and argue the NPCSC interpretation system without rational analysis and sound argument.