

PCLL CONVERSION EXAMINATION JANUARY 2024

Title of Paper : Hong Kong Constitutional Law
Date : 3 January 2024
Time : 9:30 a.m. – 9:45 a.m. (Reading Time)
9:45 a.m. – 11:15 a.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-hour 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. The paper consists of 4 pages, including three questions. Candidates are only required to answer **TWO** questions out of three. A total of 100 marks may be awarded. Each question is worth 50 marks.
8. 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 2024
Hong Kong Constitutional Law**

Answer any two of the following questions.

Question 1 (50 marks)

“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. ... In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.” *Ng Ka-ling v. Director of Immigration* [1999] 1 HKC 322-3.

“157. In any event, I have determined in this judgment that the decision of the Chief Executive not to bring the IOC Ordinance into effect is a lawful decision. I have determined that he is not at this time, nor has he ever been, in breach of his duties under s.1(2) of the IOC Ordinance. ... It seems to me that if I am now to direct the Chief Executive to bring the Ordinance into effect. - despite the fact that there has been a finding that he has no obligation in law to do so.- this court will be encroaching on the executive and political powers of the Chief Executive, powers that are specifically reserved to him under the Basic Law. In short, it seems to me that this court, if it was to make such a direction, would itself be in danger of acting unconstitutionally.” *Leung Kwok Hung & Anor v. Chief Executive of HKSAR* [2006] HKEC 239 (Hartmann J)

“In other words, the courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal working of the legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the government.” *Cheng Kar Shun v. Li Fung Ying* [2012] 2 HKLRD 555 at 617 (Cheung J).

- A. In accordance with the Basic Law of Hong Kong and relevant cases including but not limited to the above three cases, state the relationship between the legislative, executive and judicial powers with special reference to the principle of separation of powers and checks and balances. (35 marks)**
- B. Evaluate the constitutional role of the courts in upholding the Basic Law in general and the principle of separation of powers in particular. (15 marks)**

Question 2 (50 marks)

Article 158 of the Basic Law states that:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

In *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC*, [2011] 4 HKC 151 ("the Congo Case"), the Court of Final Appeal made a judicial reference to the Standing Committee of the National People's Congress ("NPCSC") to seek an interpretation of the relevant provisions of the Basic Law in accordance with Article 158 (3) of the Basic Law.

- A. Explain the rationale behind the arrangement and distribution of interpretative power in Article 158 (1) and (2) (20 marks)**
- B. Were the conditions provided in Article 158 (3) of the Basic Law for making a judicial reference to the NPCSC for interpretation satisfied in "the Congo Case"? (20 marks)**
- C. In addition to the Interpretation arising from "the Congo case", there are other four interpretations made by the NPCSC made in 1999, 2004, 2005, and 2016 respectively. Briefly identify the differences among them and comment on their impact on the judicial system of the HKSAR and the implementation of the Basic Law. (10 marks)**

Question 3 (50 marks)

In *The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region*, a White Paper issued by the State Council of the PRC, on 10 June 2014, it is stated that:

As a unitary state, China's central government has comprehensive jurisdiction (“全面管治權”) over all local administrative regions, including the HKSAR. The high degree of autonomy (“高度自治權”) of the HKSAR is not an inherent power, but one that comes solely from the authorization by the central leadership. The high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power. It is the power to run local affairs as authorized by the central leadership. The high degree of autonomy of HKSAR is subject to the level of the central leadership's authorization. There is no such thing called "residual power."

Since the publication of the White Paper, “comprehensive jurisdiction” has dominated the official discourse.

- A. Define the meaning of “unitary state” and “comprehensive jurisdiction”; (15 marks)**
- B. Analyse the relationship and the tension between “comprehensive jurisdiction” and “high degree of autonomy”. Would “comprehensive jurisdiction” jeopardise “high degree of autonomy”? If the answer is the affirmative, then in what way; and if the answer is the negative, why? (35 marks)**

~End of Examination Paper~