

PCLL CONVERSION EXAMINATION JUNE 2020

Title of Paper: Hong Kong Constitutional Law
Date: 16 June 2020
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-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 June 2020

Hong Kong Constitutional Law

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 [*Interception of Communications Ordinance*, Cap.532; full title added for the purpose of this examination] 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, state the relationship between the legislative, executive and judicial powers with special reference to the principle of the separation of powers and checks and balances. (35 marks)**
- B. Evaluate the constitutional role and the attitudes of the Hong Kong courts adopted in reviewing the practice of the Legislative and Executive Powers since the establishment of the HKSAR. (15 marks)**

Question 2 (50 marks)

In recent years, at various public gatherings, assemblies, demonstrations and forums including “Occupy Central” and “Anti-Extradition Law Amendment Bill Movement”, many youngsters stood up to declare they are not Chinese and “Hong Kong is not China”, and shouted slogans that made many other people feel uncomfortable. The Chinese Central Authorities have asserted that some foreign and international political forces are behind these activities and movements, and have supported them. However, there is no tangible evidence proving these youngsters are actually conducting actions or activities aiming at challenging the authority of the Government of the People’s Republic of China or even subverting it.

On the other hand, many people including pro-establishment politicians have called for implementing the “comprehensive power of governance” of the Central Authorities, and legislating to implement Art 23 of the Basic Law in order to safeguard national security.

At the plenary 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 issue a directive to the Government of the HKSAR for the purpose of enacting an Ordinance to implement Art 23 of the Basic Law. In his Motion, Mr. Wong directly referred to the incidents mentioned above.

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

The Secretary for Justice invites you to advise her on the CPG’s instruction and the way forward. Prepare the memorandum. (50 marks)

Question 3 (50 marks)

In Chinese law, the Hong Kong and Macau Affairs Office (HKMAO) which operates under the State Council, i.e., the Central People’s Government (the CPG), is a working body of the CPG, and the Liaison Office of the Central People’s Government in the HKSAR (LO) is a representative office of the CPG based in Hong Kong.

In response to the so-called “chaotic situation” of the House Committee of the Legislative Council arising as a result of its failure to elect its Chairman for more than six months, the Spokesman of the HKMAO, on 13 April 2020, condemned some opposition legislators for “disregarding the public interest, adopting despicable tricks to paralyze the operation of the legislature, in order to seek political private gain”, and remarked that this kind of behavior has “violated the oath, and constitutes a misconduct of public officials”.

Again, on 13 April 2020, the Spokesman of the LO made a similar comment by stating that, “This malicious ‘filibustering’ behavior is a blasphemy against the duties of the members of the Legislative Council, and not only does it fail the trust of the majority of voters, it is also a wanton destruction of Hong Kong’s overall interests”.

The above comments and condemnation have caused the controversy in the society. Some observers have questioned the authority of these two Offices to make such statements. Some legal professionals have further stressed that the two Offices by making these statements have actually violated Art. 22 (1-3) of the Basic Law, which reads:

No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.

If there is a need for departments of the Central Government, or for provinces, autonomous regions, or municipalities directly under the Central Government to set up offices in the Hong Kong Special Administrative Region, they must obtain the consent of the government of the Region and the approval of the Central People's Government.

All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.

Discuss:

- A. Referring to Art. 22 of the Basic Law and other related provisions, whether these two Offices did interfere in the affairs, “which the Hong Kong Special Administrative Region administers on its own in accordance with this Law”, thus violating the principle of “High Degree of Autonomy”. Give reasons for your answer. (30 marks)**
- B. Whether the LO has departed from its role and original mission to “abide by the Laws of the Region”. (10 marks); and**
- C. In what circumstances and under what conditions, would the two Offices be permitted to exercise a role in the affairs of Hong Kong. Give reasons. (10 marks)**

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