

PCLL CONVERSION EXAMINATION JANUARY 2022

Title of Paper: Hong Kong Constitutional Law
Date: 11 January 2022
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 3 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**

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Hong Kong Constitutional Law

Question 1 (50 marks)

‘A government that operates under the separation of powers doctrine delineates the functions of the executive, legislative and judicial branches. The idea is that they should operate largely independently of one other and that independent action should create a system of checks and balances between them. This arrangement serves to avoid excessive concentration of power, guards against abuse, and strengthens the Rule of Law.’

However, differing from the above statement, Hong Kong’s Chief Executive Carrie Lam and her administration insist that ‘Hong Kong has an “executive-led” system of government, with no formal separation of powers between the executive, the judiciary and the legislature’. Moreover, a recently published paper states that ‘underlying basis on which the doctrines of separation of powers and the parliamentary privilege of exclusive cognizance, and the corresponding principle of non-intervention, are significantly different in Hong Kong’... ‘Given Hong Kong’s semi-democratic system under the “one country, two systems” rubric, it argues for a less traditional allocation of power between the different institutions of government and a more assertive judiciary vis-à-vis the legislature.’ *Statute Law Review* 42(3), 291–304.

Discuss the ways in which Hong Kong’s constitutional system has operated in practice, with reference to the debate over whether Hong Kong has adopted a system of ‘separation of powers’ or an ‘executive-led’ system.

Question 2 (50 marks)

Regarding the National People’s Congress Standing Committee (“the NPCSC”)’s power to interpret the Basic Law, the Appeal Committee held that:

‘Thus, certain basic propositions are authoritatively established. Under the constitutional framework of the Hong Kong Special Administrative Region, the Basic law is a national law of the PRC, having been enacted by the National People’s Congress pursuant to art.31 of the Constitution of the PRC. The NPCSC’s power to interpret the Basic Law derives from art.67(4) of the Constitution of the PRC and is provided for expressly in the Basic Law itself in Basic Law 158(1) and in general and unqualified terms. The exercise of interpretation of the Basic Law under PRC law is one conducted under a different system of law to the common law system in force in the Hong Kong Special Administrative Region, and includes legislative interpretation that can clarify or supplement laws. An interpretation of the Basic Law issued by the NPCSC is binding on the courts of the Hong Kong Special Administrative Region. It declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997.’ *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 [35]

On 7 November 2016, the NPCSC exercised its power under article 67(4) of the Constitution and article 158(1) of the Basic Law to interpret article 104 of the Basic Law (“the Interpretation”).

Nonetheless, for the Interpretation, the court ruled that:

‘...the Interpretation, properly understood, states what the Hong Kong law has always been. Insofar as those matters are concerned, the Interpretation does not supplement BL104 or the ODO [“Oaths and Declarations Ordinance”] as contended. The contention that the Interpretation is a supplementation of BL104 and the ODO is erroneous.’ *Chief Executive of the Hong Kong Special Administrative Region and Another v. Clerk to the Legislative Council* (14/07/2017, HCAL224/2016) [2017] 4 HKLRD 115 [50]

Discuss the function of the NPCSC’s interpretation of the Basic Law and its constitutional limitations under the ‘One Country, Two Systems’ framework.

Question 3 (50 marks)

Professor Aharon Barak, the former President of the Supreme Court of Israel, once said: ‘Assume a law that allows the police to shoot a person (even if this shooting would lead to that person’s death) if it is the only way to prevent that person from harming another’s property. This law is designed to protect private property, and therefore its purpose is proper. The means chosen by the legislator are rational, since it advances the proper purpose. Therefore, the law meets the necessity test as well. However, the provision is still unconstitutional because the protection of private property cannot justify the taking of human life.’

The statement above illustrates a logic of human rights protection. Discuss the practice and importance of human rights protection in Hong Kong’s constitutional order, and how it may be limited, with reference to the provisions of the Basic Law and other relevant authorities.

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