

**Preparatory Courses for PCLL
Admission Conversion
Examinations (2012/2013)**

Hong Kong Constitutional Law

Key Course Reference Documents

Syllabus for Hong Kong Constitutional Law

1. The Acquisition of British Sovereignty

The Unequal treaties - the Basis of British Jurisdiction in Hong Kong - The Assumption and exercise of British Authority - The Constitution and the System of Government - Political reform in the Fifties - Development of the Administrative System - Development of Representative Government;

2. The Resumption of Sovereignty

Sovereignty and Self-Determination - Sino-British Negotiation and the Joint Declaration - the Drafting of the Basic Law - Residual Powers - Scope of Application of Chinese Constitution - The Structure of the Basic Law - Transitional Issues - Patten's Political Reform in the Nineties - Breakdown of the Through-train model - Provisional Legislative Council and its Legality;

* 3. The Framework of the Basic Law

Models of Autonomy and One Country, Two Systems - Separation of powers in the Basic Law - The nature of the Basic Law - General Principles - Relationship between Central Government and the HKSAR;

→ 8

* 4. The Political and Administrative System

The Political Structure - Basic principles - Forms of Representation - NPC - Centralized and Consultative Government - Separation of powers or Executive-led Government - Legislative Council - Composition - Powers and Functions of the LegCo - Restriction on law making powers - Law making process - Supervision of executive and parliamentary enquiry - Public Finance - Impeachment of the Chief Executive - Selection of the Chief Executive - The Executive and the Chief Executive in Council - Contradictions in the political system - Neutrality of the civil service and the Ministerial System - Localization and principal officials;

* 5. Constitutional Jurisdiction of the Courts of the HKSAR

Parliamentary sovereignty and its application to the HKSAR - Act of State - Facts of State - Judicial review of legislation - resolutions of the NPCSC;

Ng Ka Ling

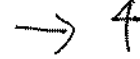
* 6. Interpretation and Amendment of the Basic Law

The importance of interpretation and the mode of interpretation - The Scheme for interpretation under Art 158 - Judicial referral, classification test and necessity test - The interpretation powers of the NPCSC and the HKSAR Courts - Problems arising under Art 158 - Legislative interpretation versus judicial interpretation - Judgment previously rendered shall not be affected - Role of the Basic Law Committee - Principles of and approach to interpretation - The scheme of Amendments to the Basic Law;



7. **Rights and Freedoms**

The General Framework for the Protection of Rights and Freedoms - Chapter 3, the Bill of Rights and the ICCPR - ICESCR and ILO - Civil and Political Rights - Economic rights and property rights - Social and cultural rights and policies - Lawful traditional rights and interests of the New Territories Indigenous Inhabitants - Limitations or restrictions of rights and freedoms - State of Emergency - Restrictions under Art 23;



8. **International Aspects of the HKSAR**

Chinese view of international law - External Affairs powers of the HKSAR - Role and problems of HKSAR in international legal regime - Succession of rights and obligations in international treaties applicable to Hong Kong before 1997 - capacity to participate in international treaties, conferences and organizations - Conflicts of law and recognition of judgments of Taiwan courts;

9. **The Constitutional System of the People's Republic of China**

Theory of socialist constitution - A brief history of Chinese Constitutional System - The PRC Constitution - Central Authorities of the PRC (NPC, NPCSC, State Council, Central Military Commission) - The role and organization of the Communist Party - Special Administrative Regions under Art 31 - Rights and legality - Sources of Law (Legislative Interpretation and Executive Interpretation) - The Judiciary, the Public Security Bureau and the Procuratorate - Review of the Judiciary - A Developing Constitution.



Reading List for Hong Kong Constitutional Law

- *Georg Brunner, "The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments" (1977) 3 Rev. Soc. Law 121-153
- *Johannes Chan, "The Jurisdiction and Legality of the Provisional Legislative Council" (1999) 27 HKLJ 374
- *Johannes Chan, "Some Thoughts on Constitutional Reform in Hong Kong," 34 (2004) HKLJ 1
- *Johannes Chan, "Civil Liberties, Rule of Law and Human Rights: The Hong Kong Special Administrative Region in its First Four Years in Lau Siu-kai (ed) The First Tung Chee-hwa Administration: The First Five Years of the HKSAR [Hong Kong: Chinese University Press, 2002]
- *Albert H. Chen "The Concept of 'One Country Two Systems' and its Application to Hong Kong" in C. Stephen Hsu (ed.) Understanding China's Legal System: Essays in Honor of Jerome A. Cohen (New York: New York University Press, 2003)
- *Albert Chen, "The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts" (1997) 27 HKLJ 387
- *Albert Chen, "The interpretation of the Basic law - common law and Mainland Chinese perspectives" (2000) 30 HKLJ 380
- *Albert H. Y. Chen "The Constitutional Controversy in Hong Kong Spring 2004," 34 (2004) HKLJ 215
- *Chen, Fu & Ghai (ed) Hong Kong's Constitutional Debate: Conflict over Interpretation (2000)
- *Yash Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law (2nd ed. 1999)
- *Hurst Hannum and Richard B. Lillich, "The Concept of Autonomy in International Law" in Dinstein (ed.), Models of Autonomy (1981)
- *Ma Ngok, "Executive-Legislative Relations: Assessing Legislative Influence in an Executive-Dominant System" in Lau Siu-Kai (ed) The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region (The Chinese University Press, 2002)
- *S. de Smith, Constitutional and Administrative Law (7th ed. 1994), p3-13,
- * Nwabueze, Constitutionalism in the Emergent States (1973), Chapter 1
- *Benny Tai Yiu-ting, "The Development of Constitutionalism in Hong Kong" in Raymond Wacks, The New Legal Order in Hong Kong (1999)

*Benny Y. T. Tai, "Chapter One of Hong Kong's New Constitution: Constitutional Positioning and Repositioning" in Ming Chan and Alvin Y. So (ed.) *Crisis and Transformation in China's Hong Kong* (M.E. Sharpe, 2002)

*Benny Tai, "One country two systems: the two perspectives" (2002) *Macau Law Journal* (Special Issue) 143-163

Sources

The Basic Law of the Hong Kong Special Administrative Region (1990)
Sino-British Joint Declaration on the Future of Hong Kong (1984)

PCLL Conversion Exam Preparation Course
Hong Kong Constitutional Law
Some Useful Reading Materials

New Books

* Johannes Chan and C.L. Lim (eds.), *The Law of the Hong Kong Constitution* (Sweet & Maxwell, September 2011); ISBN: 9789626614440. Price: HK\$2,000 (student edition also available);

P.Y. Lo, *The Hong Kong Basic Law* (LexisNexis, June 2011); ISBN 97898888054862; Price HK\$1,500;

Danny Gittings, *An Introduction to the Hong Kong Basic Law* (Hong Kong University Press, 2013);

Older Books

* Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd edition, 1999);

* Johannes Chan, Fu Hualing and Yash Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000).

Articles

- *✓ 1) Benny Tai, "One country two systems: the two perspectives" (2002) Macau Law Journal (Special Issue) 143-163
[NB. On official reading list for HK Constitutional Law]
- ✓ 2) Ma Ngok, "Executive-Legislative Relations: Assessing Legislative Influence in an Executive-Dominant System" in Lau Siu-Kai (ed) The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region (The Chinese University Press, 2002) P.349-374
[NB. On official reading list for HK Constitutional Law]
- * 3) Johannes Chan SC, *Basic Law and Constitutional Review: The First Decade* (2007) 37 HKLJ 407
[NB. On official reading list for HK Legal System]
- Read +
all
Jan '08
Q.3
4) Yash Ghai, *The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?* (2007) 37 HKLJ 363
[NB. On official reading list for HK Legal System]
- * 5) Ling Bing, *Subject Matter Limitation on the NPCSC's Power to Interpret the Basic Law* (2007) 37 HKLJ 619
[NB. On official reading list for HK Legal System]
- P.625, 645
6) Po Jen Yap, *Constitutional Review under the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong* (2007) 37 HKLJ 449
[NB. On official reading list for HK Legal System]
- 7) Danny Gittings, *Changing Expectations: How the Rule of Law Fared in the First Decade of the Hong Kong SAR* (Hong Kong Journal, Issue No. 7, July 2007)
- 8) Danny Gittings, *Hong Kong's Courts are Learning to Live with China* (Hong Kong Journal, Issue No. 19, July 2010)

Hong Kong Constitutional Law

Key Web Sites

*up to date eg. domestic
major changes - Byelection
court cases - Congo*

Examination Authority: <http://www.pcea.com.hk>

HKU HK Con Law Web Site: <http://law.hku.hk/hkconlaw>

→ Hong Kong court judgments: <http://legalref.judiciary.gov.hk>

→ Bilingual Laws Info. Service: <http://www.legislation.gov.hk/index.htm>

→ Hong Kong Legal Information Institute: <http://www.hklii.org/>

HKU Library electronic resources: <http://sunzi1.lib.hku.hk/ER/>

Hong Kong Journals Online: <http://sunzi1.lib.hku.hk/hkjo/>

Summary of Past Exam Questions

Questions are categorised according to the nine topics on the syllabus:

- 1) Acquisition of British Sovereignty
- 2) Resumption of Sovereignty
- 3) Framework of the Basic Law
- 4) Political and Administrative System
- 5) Constitutional Jurisdiction of the Courts of the HKSAR
- 6) Interpretation and Amendment of the Basic Law
- 7) Rights and Freedoms
- 8) International Aspects of the HKSAR
- 9) Constitutional System of the People's Republic of China.

April 2007 Exam:

- Qu. 1 Topic 5: Constitutional Jurisdiction of the Courts (Ng Ka Ling on power to invalidate actions of NPC/NPCSC 8 years on)
- Qu. 2 Topic 7: Rights and Freedoms (Independent human rights commission and complaints against the police)
- Qu. 3 Topic 3: Framework of the Basic Law (One Country Two Systems and autonomy)

August 2007

- Qu. 1 Topic 3: Framework of the Basic Law (One Country Two Systems and autonomy) (NB. Very similar to Qu. 3 on April 2007 paper)
- Qu. 2 Topic 4: Political and Administrative Structure (Executive-led political structure)
- Qu. 3 Topic 4: Political and Administrative Structure (Selection of Chief Executive) and Topic 6: Interpretation and Amendment (Purposive interpretation)

2/4

January 2008

- Qu. 1 Topic 3: Framework of the Basic Law (Residual powers, One Country Two Systems and autonomy)
(NB. Some similarities to Qu. 3 on April 2007 paper and Qu. 1 on August 2007 paper)
- Qu. 2 Problem Question
Topic 5: Constitutional Jurisdiction of Courts (NPCSC action breaching HK Basic Law) and Topic 7: Rights and Freedoms (Freedom of Association)
- Qu. 3 Topic 6: Interpretation and Amendment (Court of Final Appeal interpretation of Hong Kong Basic Law)
- Qu. 4: Topic 7: Rights and Freedoms (Bill of Rights 10 years on)

July 2008

- Qu. 1 Topic 4: Political and Administrative System (functional constituencies) and Topic 7: Rights and Freedoms (International Covenant on Civil and Political Rights)
- Qu. 2 Topic 5: Constitutional Jurisdiction of Courts and Topic 6: Interpretation and Amendment (Ng Ka Ling 9 years on)
- Qu. 3 Topic 3: Framework of the Basic Law (One Country Two Systems and Tibet)
- Qu. 4 Problem Question
Topic 7: Rights and Freedoms (Radio broadcasting)

Jan 2009

- Qu. 1 Topic 4: Political and Administrative System (Separation of Powers)
- Qu. 2 Topic 7: Rights and Freedoms (Article 23)
- Qu. 3 Problem Question
Topic 7: Rights and Freedoms (Restrictions)
- Qu. 4: Topic 7: Rights and Freedoms (Ng Kung Siu)

June 2009

- Qu. 1 Topic 2: Resumption of Sovereignty + any part of syllabus (implementation of Joint Declaration)
- Qu. 2: Topic 3: Framework of the Basic Law (One Country Two Systems and High Degree of Autonomy)
- Qu. 3: Topic 7: Rights and Freedoms (Article 23)
- Qu. 4: Topic 6: Interpretation and Amendment (Chong Fung Yuen)

January 2010

- Qu. 1 Topic 3: Framework of the Basic Law (One Country, Two Systems)
- Qu. 2: Topic 4: Political and Administrative System (Functional Constituencies) and Topic 7: Rights and Freedoms (International Covenant on Civil and Political Rights)
(NB. Very similar to Qu. 1 on July 2008 paper)
- Qu. 3: Topic 7: Rights and Freedoms (Ng Kung Siu)
(NB. Very similar to Qu. 4 on January 2009 paper)
- Qu. 4: Topic 4: Political and Administrative System (Legislative Council) and Topic 6 (Purposive interpretation)

June 2010

- Qu. 1 Topic 3: Framework of Basic Law (High Degree of Autonomy)
- Qu. 2: Topic 4: Political and Administrative System (Separation of Powers)
- Qu. 3: Topic 4: Political and Administrative System (Selection of Legislative Council) and Topic 6 (Purposive interpretation)
- Qu. 4: Topic 4: Political and Administrative System (Legislative Council)

January 2011

- Qu. 1 Topic 2: Resumption of Sovereignty (Nature of HK Basic Law) *National Law / Cons*
- Qu. 2 Topic 3: Framework of Basic Law (Relations between CPG and HKSAR) *High Degree of Autonomy*
- Qu. 3 Topic 5: Constitutional Jurisdiction of the Courts
- Qu. 4 Problem Question
Topic 7: Rights and Freedoms (Freedom of Assembly and Article 23)

June 2011

- Qu. 1 Topic 3: Framework of Basic Law (Nature of HK Basic Law) *Diff. aspects of BL.*
- Qu. 2 Topic 7: Rights and Freedoms (Freedom of Expression)
- Qu. 3 Topic 5: Constitutional Jurisdiction of the Courts (HuaTian Long case)
- (Note: Only 3 questions on this paper)

January 2012 *Topical issues*

- Qu. 1 Topic 6: Interpretation and Amendment (Judicial Referral in the Congo case)*
- Qu. 2 Multiple Topics: Constitutionalism
- Qu. 3 Topic 4: Political and Administrative System and Topic 7: Rights and Freedoms (By-election reform)*
- Qu. 4 Topic 3: Framework of Basic Law (High Degree of Autonomy)

- ① No consistent pattern - examiners may set any mix of questions on main areas of syllabus.
- ② Some questions very similar to past questions.
- ③ Keep up to date with big topical issues

Analysis of Questions on Different Topics on Syllabus:

- 1) Acquisition of British Sovereignty

NONE

- 2) Resumption of Sovereignty

2 past questions
- Joint Declaration

- 3) Framework of the Basic Law

10 (on most but not all papers).

- 1 country 2 systems
- High degree of autonomy.
- Nature of Basic Law.

✓
~~General~~
General,
well
answered

- 4) Political and Administrative System

10 (on most but not all).

* Must know - because sometimes multiple questions

wide variety of questions

* - SOP

* - Election Systems. (selection process for CE).

5) Constitutional Jurisdiction of the Courts of the HKSAR

4 relating to ⁵ Ng Ka Ling.

6) Interpretation and Amendment of the Basic Law

7 (on many but not all)
- purposive interp.
*- Judicial referral (COA → SC of NPC).

7) Rights and Freedoms

14 (more than any other topics)
BUT Not on every exam
Wide variety
- sometimes problem questions.

8) International Aspects of the HKSAR

NONE direct - BUT part of Jan 2011, Q.2.

9) Constitutional System of the People's Republic of China.

NONE

PCLL Conversion Examination April 2007

Hong Kong Constitutional Law

Question 1

"[W]hether judicial power includes a [particular] power in a particular jurisdiction is a most intricate question concerning the proper role of the courts in the jurisdiction concerned. It would necessarily involve a consideration of the courts' function in the light of the separation of powers and the relationship between the executive, the legislature and the judiciary. Ultimately, it is a question which has to be decided in the light of the constitutional framework of the jurisdiction concerned. It is a problem which by its nature may not be susceptible to a common approach across the common law world. It may be inevitable that different jurisdictions would come to divergent answers to this difficult problem."

Court of Final Appeal in HKSAR v. Hung Chan Wa and the Other (FACC No. 1 of 2006)

In light of this comment by the Court of Final Appeal in 2006, if the Court of Final Appeal were to reconsider the constitutional issue on whether the Courts of the HKSAR have the power to invalidate any legislative acts of the National People's Congress or its Standing Committee that are inconsistent with the Basic Law, what would be the Court of Final Appeal's decision?

Support your answer with reference to the HKSAR Basic Law under the framework of 'One Country Two Systems'.

Question 2

The Human Rights Committee in the Concluding Observations of the Human Rights Committee of the second periodic report of the HKSAR stated that:

"8. The Committee regrets that the HKSAR has not implemented a number of recommendations contained in its previous concluding observations. It remains concerned regarding the limited mandate and powers of the Ombudsman, including its lack of oversight function of the police, and the Equal Opportunities Commission.

The HKSAR should consider the establishment of an independent human rights institution compliant with the Paris Principles.

9. *The Committee remains concerned that investigations of police misconduct are still carried out by the police themselves through the Complaints Against Police Office (CAPO), and that the Independent Police Complaints Council (IPCC) does not have the power to ensure proper and effective investigation of complaints or for the effective implementation of its recommendations (article 2).*

The HKSAR should ensure that the investigation of complaints against the police is carried out by an independent body, the decisions of which are binding on relevant authorities. ”

You are asked to advise the HKSAR Government on how the Government should respond to the comments by the Human Rights Committee. Prepare an opinion and support your views with reasons.

Question 3

“The principle of ‘one country, two systems’ should be understood in a correct and all around way. ‘One country’ is to maintain the sovereignty, unity and territorial integrity of China, while ‘two systems’ means that some regions may practice capitalism under the authorization of the central government while the main body of China practices socialism. The two aspects of the principle must be integrated. Without ‘one country’, there would be no ‘two systems’. If one only talks about ‘two systems’ while neglecting ‘one country’, the high degree of autonomy would be like water without source..... We should bear in mind that ‘one country’ is the premise and basis of the ‘two systems’.”

Xia Yong, Director, Institute of Law, Chinese Academy of Social Science, “One Country” is the premise and foundation of “Two Systems”, 23 February 2004.

Discuss how this understanding of “One Country Two Systems” may affect the high degree of autonomy of Hong Kong. Illustrate your answer with recent constitutional debates in Hong Kong.

PCLL Conversion Examination August 2007

Hong Kong Constitutional Law

Question 1

“‘One country, two systems’ is an integral concept. ‘One country’ is the prerequisite of ‘two systems.’ Without ‘one country’ there will be no ‘two systems’. ‘One country’ and ‘two systems’ cannot be separated from each other. Still less should they be set against each other.

The ‘one country’ means that the power vested in the central government according to law to maintain national sovereignty, unity and security must be upheld. The ‘two systems’ means that the high degree of autonomy enjoyed by the Hong Kong Special Administrative Region according to law must be ensured and governing according to law by the Chief Executive and the Hong Kong Special Administrative Region Government must be supported.

Only when these two points are fully observed, can the strength of the ‘one country, two systems’ be brought into play to the real benefit of the people of Hong Kong.”

Hu Jintao, President of the PRC, in the speech marking the swearing in of the third term HKSAR Government on 1 July 2007

**Do you agree with President Hu’s understanding on “one country, two systems”?
Support your view with reference to the Hong Kong Basic Law and the Sino-British Joint Declaration.**

Question 2

In a speech delivered in a seminar marking the 10th anniversary of the Basic Law on 6 June 2007, Wu Bangguo, Chairman of the Standing Committee of the National People’s Congress reemphasized that the most important characteristic of the political structure of the Hong Kong Special Administrative Region is that it is executive-led.

① **Illustrate the provisions of the Basic Law that establish the executive-led form of government in the Hong Kong Special Administrative Region and review whether the design of the Basic Law can achieve its objective in the actual implementation in the last ten years.**

① P. 33 notes Topic 4. Ma Ngok.
② (5) dissolve LEGCO → doesn't use this power.

Question 3

Article 45 of the Basic Law provides that:

"The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."

2017

Apply the purposive approach of interpretation of the Basic Law suggested by the Court of Final Appeal in *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315 and recommend a set of nomination procedures required by Article 45 of the Basic Law. Illustrate in your recommendation how the different requirements in your proposal can be explained by the purposive approach of interpretation.

3. ① Background: significance of this issue
- NPCSC Dec 2007 decision has said ultimate aim of universal suffrage may be implemented in 2017.
 - ② NPCSC Dec 2007 decision also stated nominating committee for election by universal suffrage may be formed by reference to current election committee. End of Examination Paper
 - ③ Ng Ka Ling - language & purpose in light of context.
 - ④ But, Chong Fung Yuen (2001) - if language unambiguous, apply clear meaning of words.
 - ⑤ This does not apply here because wording of Art 45 is ambiguous, so will need to consider context.
 - ⑥ Context of other provisions in HKBL.
 - Annex 1, Art 68 *Art 26 (right to stand for election - Human right) → and Art 39 incorporating rights in ICCPR.
 - ⑦ → Art 25 ICCPR states right must not be subject to "unreasonable restrictions".
 - ⑧ current system of nominations requires
 - 150 out of 1200 members of EC (Annex 1 (4))
 - ⑨ Is this an unreasonable restriction? Evidence of 2012 CE Election suggests does not prevent diversity of CE candidates from being nominated.
 - ⑩ Most often discussed alternative is to tighten nomination requirement by requiring nominations from all 4 sectors of EC.
 - ⑪ Is this reasonable restriction on right to vote? Possible not, but also need to consider purpose → Purpose of having 4-sector EC is to ensure CE has support of 4 sectors.

PCLL Conversion Examination August 2007

Hong Kong Constitutional Law

Extracts from the Examiner's Report

The overall performance of the students was adequate. Most of them were able to demonstrate a basic level of understanding of the relevant legal and constitutional issues and principles.

Even though a lot of the students may have studied overseas, the answers showed that they were able to maintain their connection with the local situations of Hong Kong. This is especially important as the nature of this subject requires student to have a certain level of sensitivity and understanding of the local political environment and development.

However, many of them failed to read the question carefully and they seemed to have a tendency to dump everything they knew about some keywords mentioned in the question into the answer without seriously thinking whether the information was related with the question or in what specific way.

In some answers, even though the student had put down a lot of information on Hong Kong's constitutional law demonstrating a certain level of understanding, the information was not directly relevant (or not even indirectly in some extreme cases) to the question asked and therefore could not be taken as answering the question. Most failed papers are of this kind.

Even if the information was relevant to the question, some answers were unstructured and the analysis was incoherent and failed to address directly the issues raised in the questions.

Good answers were found to be those, which need not be long, that can identify the key issues raised in the question and address those issues directly, systematically and critically.

PCLL Conversion Examination January 2008

Hong Kong Constitutional Law

Question 1

Wu Bangguo, Chairman of the Standing Committee of the National People's Congress, said, "Hong Kong Special Administrative Region only has as much power as authorized by the Central Government. ... There is no so-called 'residual power' question."

Do you agree with Wu's understanding on Hong Kong Special Administrative Region and residual power within the framework of "One Country Two Systems"? Do you think this understanding will affect the high degree of autonomy enjoyed by the Hong Kong Special Administrative Region? Support your view with reasons and recent events in Hong Kong.

Question 2

The National People's Congress passed the Law Against Falun Gong. It provides that: "all organizations with their goals to promote or uphold the beliefs and practices of Falun Gong are to be dissolved." The Law also stipulates that any person who continues to be involved in activities of such organization after its dissolution commits an offence and is liable for 3 year imprisonment. The Law is stated to be applicable to the whole country.

The Standing Committee of the National People's Congress amended Annex III of the Basic Law according to Article 18 of the Basic Law of the Special Administrative Region and added the Law Against Falun Gong. However, the Basic Law Committee was not consulted.

The Falun Gong organization in Hong Kong (HKFL) is registered under the Societies Ordinance (Cap. 151). The Secretary for Security published an order to prohibit the operation or continued operation of the HKFL in Hong Kong according to section 8(2) of the Societies Ordinance.

Section 8 of the Societies Ordinance provides that:

"(1) The Societies Officer may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of the society or the branch -
(a) if he reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others; ...

Not law in HK
(not promulgated)
procedural
→ broken HKBL
↓
Ng Ka Ling
- Do HK courts have jurisdiction to invalidate actions of NPC/SC.

(2) On the recommendation by the Societies Officer under subsection (1), the Secretary for Security may by order published in the Gazette prohibit the operation or continued operation of the society or the branch in Hong Kong."

Mr. Chan, the chairperson of the HKFL, is charged with committing an offence under the Law Against Falun Gong for his involvement with activities organized by the HKFL after its dissolution.

You are asked to prepare a defence for Mr. Chan.

Freedom of association
Art 27 BL + Art 22 ICCPR.
Legality *
Necessary = National security? X
Proportionate = X

Question 3

"...the Hong Kong courts have done an impressive job in maintaining the superior status of the Basic Law (particularly in 'internal matters'), the protection of autonomy of Hong Kong, rights of its residents, and the integrity of the legal system. They, and particularly the CFA, have tried to assert their jurisdiction and to uphold the constitution. They have used arguments of history, the objectives of the Joint Declaration, the purposive approach common to both common and civil law, and the interpretative techniques of the common law (great attention to text and precedent), to justify the autonomy of Hong Kong."

Yash Ghai, "The Intersection of Chinese Law and the Common Law in the Hong Kong Special Administrative Region: Question of Technique or Politics?" (2007) 37 HKLJ 363, at 403

Illustrate with the decisions of the CFA and analyze whether the assessment by Professor Yash Ghai on the achievement of the CFA is right.

Question 4

You are invited to give a guest lecture to the first year law students of the Faculty of Law, University of Hong Kong. The title of the talk is: "The First Ten Years of the Bill of Rights of the Hong Kong Special Administrative Region."

Prepare the speech.

1997-2007

PCLL Conversion Examination January 2008

Hong Kong Constitutional Law

Extracts from the Examiner's Report

1. Students are tested not only on the depth of knowledge on a specific area of constitutional law of Hong Kong, but are also examined on their width of knowledge.
2. The overall performance of students may be affected by this change as there are more cases of fail. Many students may be adequate in one question, but performed badly in another question causing their final mark below the passing mark (i.e. 50).
3. Most students can produce an adequate or a good answer for question 1. Students are expected to address the concept of residual power and the provision in the Basic Law concerning the residual power of the HKSAR. They also need to explain how that will affect Hong Kong's high degree of autonomy. If a student can present his/her critical and independent view on Wu's statement and support it with recent events, he/she can get a reasonably good mark.
4. The overall performance of students answering question 2 is not very good. Students are expected to address the constitutionality of the Law Against Falun Gong and s.8(2) of the Society Ordinance. On the Law Against Falun Gong, students need to consider the legal impact of failing to consult the Committee for the Basic Law. On s.8(2) of the Society Ordinance, students need to elaborate more on the legitimate aim justifying the restriction and whether the restriction is necessary and proportionate. Many students answering this question failed to address both issues causing them get a poor mark.
5. Most students can produce an adequate or a good answer for question 3. Good answers are those that can illustrate the political context in which the HKSAR Courts decide cases and examples of how the HKSAR Courts, especially the Court of Final Appeal, had tackled difficult constitutional issues.
6. The overall performance of students answering question 4 is not very good. Students are expected to address the constitutional status of the Bill of Rights Ordinance and the ICCPR and illustrate the analysis through some recent court decisions. Many students answering this question failed to address both issues causing them get a poor mark.

PCLL Conversion Examination July 2008

Hong Kong Constitutional Law

Question One

There have been proposals to retain functional constituencies as a method to elect members of the Legislative Council of the HKSAR in the long run.

Consider whether the method of functional constituencies even as modified in some proposals is consistent with the requirements in the Basic Law and the International Covenant on Civil and Political Rights.

Question Two

Ng Ka Ling v Director of Immigration [1999] 1 HKLRD 315 is among the first decisions made by the Court of Final Appeal of the HKSAR concerning the Basic Law.

Review the current constitutional significance of this case, over nine years the judgment was delivered.

Question Three

The Dalai Lama has advocated that the national policy of “One country, two systems” following the Hong Kong model should also be applied to Tibet. However, the white paper entitled “National Regional Autonomy in Tibet” issued by the government of the People’s Republic of China in 2004 made clear the government’s view that, unlike Hong Kong, Tibet is not faced with questions related to the resumption of sovereignty and the possibility of re-introducing another social system. From the nature of “One country, two systems” and the experience of its application in Hong Kong, consider whether “One country, two systems” should be applied to Tibet.

Question Four

The Market Radio of Hong Kong (MRHK) is a private company set up to provide radio broadcasting in Hong Kong. MRHK applied to the Broadcasting Authority for a licence to provide radio broadcasting as required by the Telecommunications Ordinance. The application was rejected by the Broadcasting Authority and the Chief Executive in Council.

The Telecommunications Ordinance, stipulates,

"8. Save under and in accordance with a licence granted by the Chief Executive in Council or with the appropriate licence granted or created by the Broadcasting Authority, no person shall in Hong Kong deal in the course of trade or business in apparatus or material for radio communications or in any component part of any such apparatus or in apparatus of any kind that generates and emits radio waves whether or not the apparatus is intended, or capable of being used, for radio communications.

9. Any corporation may apply to the Broadcasting Authority in such form as the Broadcasting Authority may determine, for a licence to establish and maintain a broadcasting service.

10. (1) The Broadcasting Authority shall consider applications made under section 9 and make recommendations thereon to the Chief Executive in Council.

(2) Having considered the recommendations made under subsection (1) in respect of an application for a licence to establish and maintain a broadcasting service, the Chief Executive in Council may grant a licence to the applicant and such licence shall be subject to the payment of such fee, royalty or other charge whatsoever, whether annual or otherwise, and to such terms and conditions as the Chief Executive in Council may specify in the licence.

23. Any person who, knowing or having reason to believe that a means of radio communications is being maintained in contravention of this Ordinance, transmits or receives any message by such means of radio communications or performs any service incidental to the transmission or reception of any such message or delivers any message for transmission by such means of radio communications or takes delivery of any message sent thereby shall be guilty of an offence and shall be liable on summary conviction to a fine of \$50,000."

Advise MRHK in its legal action to challenge the decisions of the Broadcasting Authority and the Chief Executive in Council on the basis of the constitutionality of the relevant provisions of the Telecommunications Ordinance.

~ End of Examination Paper ~

PCLL Conversion Examination
2nd July 2008
Examiner's Comments
Hong Kong Constitutional Law

1. The time for answering each question has been increased. However, I cannot find a corresponding improvement in the quality of the answers.
2. Another general mistake committed by the students is that they failed to read the questions carefully. Many students just put down a whole chunk of information related with some terms and phrases mentioned in the question without explaining how they were related to the issues raised in the questions.
3. It seems that the performances of students are not good if the question requires more complicated application of constitutional knowledge.
4. For Question 1, students are expected to cover meaning of functional constituencies in the history of Hong Kong's constitutional development; different proposals to maintain functional constituencies; reservation by the UK government on the Article 25 of the ICCPR and its relevance to the application of Article 25 after 1997 in the HKSAR; the meaning of universal suffrage in Article 68 of the Basic Law.
5. The overall performance of students answering Question 1 is not very good. Many students failed to provide sufficient elaboration on the modified proposals on functional constituencies; the requirements of the Basic Law and the ICCPR; and their compatibility.
6. For Question 2, students are expected to cover: constitutional jurisdiction of the courts of the HKSAR to review compatibility of legislative acts of the National People's Congress and its Standing Committee with the Basic Law; approaches of interpretation of the Basic Law; referral for interpretation by the Standing Committee of the Basic Law under Art. 158 of the Basic Law; substantive issues on the right of abode of mainland children including the wedlock issue, time of birth issue and valid travel document issue; interpretation by the Standing Committee of the National People's Congress; subsequent decision of the Court of Final Appeal in Chong Fung yuen.

No requirement for elections.

Small but large under Patten

7. The overall performance of students answering question 2 is adequate. Most students can demonstrate some understanding of certain issues in Ng's case though most answers can only cover one to two major issues.
8. For Question 3, students are not expected to have a good understanding of the situation in Tibet but to consider whether "resumption of sovereignty" and "maintenance of another social system" are prerequisites for the application of "One country, two systems" as raised by the Chinese government in the white paper on the "National Regional Autonomy in Tibet" issued in 2004.
9. Most students can produce an adequate for question 3. More explanation may need to be given on why "One country, two systems" must incorporate "resumption of sovereignty" and "maintenance of another social system" .
10. Question 4 is based on a similar case considered by a magistrate on 8 January 2008. Students are expected to consider these issues: restriction on the right to freedom of expression; unchecked discretion of the Chief Executive in Council; restrictions of the right lack certainty and are therefore not prescribed by law; necessity and proportionality of the restriction.
11. The overall performance of students answering question 4 is very bad. Most students could only mention the freedom of expression but failed even to state the relevant constitutional principles in handling a bill of rights case; not to say applying those principles.

PCLL Conversion Examination January 2009

Hong Kong Constitutional Law

Question One

Xi jin-ping, Vice-President of the People's Republic of China, in a meeting with principal executive, legislative and judiciary officials during his visit to Hong Kong in early July 2008 urged that "there should be solidarity and sincere co-operation within the governance team of the HKSAR and there should be mutual understanding and support amongst the executive, the legislature and the judiciary of the HKSAR."

These remarks have caused debates and concerns, especially in respect of the call for mutual understanding and support amongst the Executive, the Legislature and the Judiciary.

You are the chairperson of a group of young lawyers in Hong Kong and are invited to give a speech to law students at the University of Hong Kong on the appropriateness of Xi's remarks in light of the constitutional principles reflected in the Basic Law of the HKSAR. Write your speech.

Question Two

Macau is now in the process of enacting the law to implement Article 23.

You are asked to give advice to the HKSAR Government on (a) whether Hong Kong should also resume a similar process in the near future and (b) what should be the guiding principles in enacting the law to implement Article 23.

Question Three

Oscar was the producer of a drama. The drama portrayed Jesus Christ in acts of a sexual nature with a nun. The drama was shown in public and was a commercial production. Oscar is now prosecuted for violating the common law offense of blasphemy.

According to Whitehouse v. Gay News Ltd and Lemon [1979] AC 617, "every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves." The offense is triable on indictment and punishable by fine or imprisonment. - unlimited.

Ng Kung
sin (1999)
- modes v
substance

You are the counsel representing Oscar. Prepare the defence for Oscar.

Freedom of expression
Restrictions.

Legality test: Analyse wording - sufficiently precise & absolute clarity. Wingrove v UK (1996): ✓
Necessity test: legitimate aim - respect for rights & reputation of others.
Proportionality test: ✓ - analogy w/ Ng Kung sin, restriction or ✓ - unlimited punishment clearly disproportionate

Question Four

HKSAR v. Ng Kung-siu and another [2000]1 HKC 117 is one of the controversial decisions of the Court of Final Appeal of the HKSAR concerning the Basic Law.

Give your views on whether the case was rightly decided and review the constitutional significance of this case.

~ End of Examination Paper ~

PCLL Conversion Examination

5th January 2009

Examiner's Comments

Hong Kong Constitutional Law

1. Students continue to make the same big mistake by failing to read the questions carefully. They just put down a whole chunk of information related with some terms and phrases mentioned in the question without explaining how they were related to the issues raised in the questions.
2. Performances of students continue to be not satisfactory if the question requires more complicated application of specific constitutional knowledge (like question 3).
3. For Question 1, students are expected to cover Constitutional principles include: Government of the HKSAR accountable to the Legislative Council (Art. 64); executive-led form of Government and judicial independence (Art. 12 and 19) and the separation of powers. Students are expected to review Xi's statement on what he wanted to express. People's concern that the Legislative Council and the Judiciary may be under pressure to compromise their constitutional role of checking the Executive authorities has to be discussed.
4. The overall performance of students answering Question 1 is satisfactory. Most students were able to demonstrate adequate understanding on the inter-relationship between the three branches of government in the HKSAR. Most students rightly emphasized the importance of the doctrine of separation of powers but some failed to analyze the tension between doctrine of separation of powers and the executive-leg principle which has been asserted by Chinese officials as the most important feature of the design of the HKSAR's political system.
5. For Question 2, students are expected to discuss the constitutional duty to legislate to implement Article 23 and the political situations in HK that may affect the legislation including the opposition of HK people and demand from the CPG. On what should be the guiding principles in enacting the law to implement Article 23, the following principles suggested by the Government of the HKSAR in the previous consultation are to be discussed: (a) the need to fully implement the provisions of the Basic Law, including Article 23 which stipulates the acts to be prohibited; and other relevant provisions in Chapter III, particularly Article 27 and Article 39; (b) the need to protect adequately the state's essential

interests, namely, sovereignty, territorial integrity, unity, and national security; and (c) the need to ensure that all offences encompassed by local legislation to implement Article 23 are as clearly and tightly defined as appropriate, so as to avoid uncertainty and the infringement of fundamental rights and freedoms guaranteed by the Basic Law. Students have to discuss whether there are any additional principles.

6. The overall performance of students answering question 2 is satisfactory. However, many students failed to directly answer the question. Many students have used a lot of space to discuss the history of the Article 23 legislation in 2003 or pre-HKSAR laws on national security, but the two major issues in the question (the timing issue and the guiding principles issue) were only touched on superficially.
7. For Question 3, Students are required to consider (a) whether the common law offence of blasphemy has infringed any right protected by the ICCPR (freedom of expression), (b) whether a “common law” provision is “law” that can limit a right; (c) whether the common law offence of blasphemy satisfies the principle of legal certainty; (d) what is the legitimate aim justifying the limitation; (e) whether the limitation is necessary and proportionate.
8. Most students performed badly in this question. A lot of them discussed the legal status of the BORO and ICCPR without addressing the legal issues in the case. For those who did mention the relevant legal tests, their arguments were weak and analysis thin.
9. Students are required to consider CFA’s decisions in Ng Kung Siu concerning: (a) the provision of the National Flag ordinance as only a limitation on the mode of expression but not on the content of expression; (b) the legitimate aim of public order (*ordre public*) and the interest in the national flag; (c) the necessity and proportionality of the limitation. Students are also required to consider whether the CFA had been too conservative in deciding this case in light of the first interpretation by SCNPC in 1999.
10. The overall performance of students answering question 4 is satisfactory. Most students were able to mention the major issues concerning the application of the legal tests in determining the constitutionality of the provision of the National Flag Ordinance. However, they may need to elaborate more on the constitutional significance of the case.

PCLL Conversion Examination June 2009

Hong Kong Constitutional Law

Question One (50 marks)

Select any two sections of Annex I of the *Joint Declaration of the United Kingdom Government and the Chinese Government over the question of Hong Kong* and evaluate how far the provisions have been applied in the implementation of the Basic Law in the last 12 years.

Question Two (50 marks)

Jan 2010 @ 1

Cao Erbao, an official of the Liaison Office of the Central People's Government in the HKSAR, published an article, "Governing Hong Kong under the Conditions of 'One Country, two Systems,'" on 28 January 2008 in *Study Times*, a newspaper founded by the Party School of the Central Committee of the Chinese Communist Party. In the article, he said:

"Because our country took back Hong Kong according to the 'one country, two systems' policy under which 'Hong Kong people governing Hong Kong' with a high degree of autonomy is implemented, the governing power also changed from a single governing team, namely, the British Hong Kong Government ('British Hong Kong authorities') before Reunification to two governing teams under the conditions of 'one country, two systems' after Reunification. One is the 'Hong Kong SAR establishment team', which includes the Chief Executive, Principal Officials, members of the Executive Council and the civil service, the Judiciary and other personnel of the administration of justice system. This team exercises high degree of autonomy according to the Basic Law, by delegated authority delegated by the Central Authorities. The other team is "the team of cadres of Central and Mainland Authorities carrying out Hong Kong work which includes departments of the Central Government and their external organs with responsibilities in Hong Kong affairs or specializing on Hong Kong work; departments of the Central Government responsible for other national affairs and relevant policies; and cadres in the Government and Chinese Communist Party Committees of provinces, cities and districts closely related to the HKSAR, who handle matters involving Hong Kong. This team exercises constitutional powers to govern the SAR (including dealing with the relationship between the Central and Mainland authorities, and the HKSAR) in accordance with our Constitution and the Basic Law of the HKSAR, and does not interfere with the affairs within the autonomy of the SAR. These two governing teams are the political power through which the policy of 'one country, two systems' over Hong Kong is implemented, and they are the subjects who implement the Basic Law."

Do you agree with Cao's view that there are two governing teams in the operating of the HKSAR? Consider how Cao's view may affect the high degree of autonomy enjoyed by the HKSAR.

Question Three (50 marks)

The Law on the Protection of State Security enacted to implement Article 23 of the *Basic Law of the Macau Special Administrative Region* establishes various offences including subversion and sedition in the following terms:

“Article 3

(1) Whoever, by means of violence or by other serious unlawful means, attempts to overthrow the Central People’s Government, or to obstruct or constrain the Central People’s Government to practice an act or an omission, shall be punished with a penalty of 10 to 25 years of imprisonment.

(2) Whoever commits preparatory act of the offence mentioned in the previous paragraph shall be punished with a penalty of 3 years.

Article 4

(1) Anyone who incites, directly and in public, other persons to commit the acts provided in Article 1, Article 2 or Article 3 shall be punished with 1 to 8 years imprisonment.”

If the HKSAR were to enact the two offences in similar terms, review whether they are compatible with the *International Covenant on Civil and Political Rights* as applied to Hong Kong.

Question Four (50 marks)

The Director of Immigration v. Chong Fung Yuen and others [2001] 2 HKLRD 533 is one of important decisions of the Court of Final Appeal of the HKSAR concerning the Basic Law.

Give your views on whether the case was rightly decided and review the constitutional significance of this case.

- End of Examination Paper -

PCLL Conversion Examination

30th June 2009

Examiner's Comments

Hong Kong Constitutional Law

1. For Question 1, Students are expected to select two sections of Annex I, Joint Declaration and identify relevant provisions in the Basic Law. Some sections may include many constitutional arrangements and students do not need to discuss all constitutional arrangements in the sections on the condition that at least two substantial constitutional arrangements are analyzed. They are also expected to review how far the actual implementation of the provisions of the Basic Law in the past 12 years had achieved the objectives of the two sections or constitutional arrangements of the Joint Declaration. *recent events in HK*
2. The overall performance of students answering Question 1 is satisfactory. Most students were able to demonstrate adequate understanding on how the Basic Law has implemented the selected sections of the Joint Declaration.
3. The focus of Question 2 is on how far the so called "second governing team" should participate in the governance of the affairs of the HKSAR. First, Students have to give their understanding of high degree of autonomy. Second, they have to give an understanding of the powers enjoyed by the second governing team in the Basic Law and whether they enjoy any actual powers in the governance of the HKSAR. Third, they have to consider whether the second governance team in the actual implementation of the Basic Law had infringed the high degree of autonomy of the HKSAR.
4. The overall performance of students answering Question 2 is satisfactory. Most students were able to demonstrate adequate understanding on the nature of the autonomy enjoyed by the HKSAR under One Country Two Systems and how far the existence and operation of the so called "second governing team" has affected the realization of the high degree of autonomy by the HKSAR.
5. For Question 3, students are required to consider (a) whether the offences of subversion and sedition limit any right protected by the ICCPR, (b) whether the provisions satisfy the principle of legal certainty, (c) what is the legitimate aim justifying the limitation, and (d) whether the limitation is necessary and proportionate.

6. Most students performed badly in this question. A lot of them discussed the legal status of the BORO and ICCPR without addressing the constitutional principles on human rights protection in the analysis of the two offences.
7. For Question 4, students are required to consider CFA's decisions in *Chong Fung Yuen* concerning:
 - (a) whether the common law approach of interpretation suggested in this case is different from the purposive approach of interpretation suggested in *Ng Ka-ling*,
 - (b) whether a provision of the Basic Law should be referred to the Standing Committee of the National People's Congress for interpretation is to be determined by the character or the substantive effect of the provision,
 - (c) whether the interpretation of Art. 24(1) is right,
 - (d) how the decision of this case causes the rise of pregnant women from mainland China giving birth in Hong Kong.

Students may further consider whether the decision should be reversed and how that can be done.

8. The overall performance of students answering Question 2 is satisfactory. However, most students can provide a detailed analysis on only one of the main issues of the case demonstrating their understanding of a certain aspect of the case and its constitutional significance but they cannot provide a comprehensive analysis of the case.

PCLL Conversion Examination January 2010

Hong Kong Constitutional Law

Question One (50 marks) *June 2009 Q2.*

"During the first five years following Hong Kong's reunification with China, the mainland's general policy towards Hong Kong was rather laissez faire. Even during the early days of economic crisis in 1997-98, the message from the central continued to be that 'Hong Kong People can run Hong Kong successfully'.

...The turning point came in July 2003...500,000 people launched demonstrations due to several sources of dissatisfaction—security legislation proposed under Article 23 of the Basic Law, a failing economy, the handling of the SARS epidemic and perceived shortcomings of the Tung Chee Hwa administration.

The protest caused the government to put aside its pending National Security Ordinance two months later, an event regarded by all sides as a watershed for Hong Kong's political environment.

...Since then, a new paradigm in the Beijing-Hong Kong relationship has taken shape.

...the 'new' Hong Kong policy of Beijing ...is a reaction to changes in Hong Kong's own political environment since 2003. It is different from the old 'well water does not interfere with river water' policy, in the sense that it emphasizes more central government engagement and involvement in Hong Kong's political development. While the former policy gave more weight to the 'two systems', the more recent policy gives more weight to 'one country'.

...if the political environment in Hong Kong changes so that Beijing is no longer the target of local politics, Beijing may also withdraw from the arena. But until then, the natural and necessary choice for the central government is to support the executive, whether or not it is popular."

Cheng Jie "The Story of a New Policy," (2009) 15 *Hong Kong Journal*

The author suggested that there was a change in mainland's policy towards Hong Kong: from laissez faire to direct engagement and involvement. Discuss the impact of this 'new policy' of direct engagement and involvement by the central government on the autonomy of Hong Kong. Give reasons to support your answer.

Question Two (50 marks)

The Chief Secretary for Administration, Mr. Henry Tang, in introducing the *Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012* to the Legislative Council, said:

“As for the universal suffrage model for the LegCo, we consider that the existing [functional constituency] elections have yet to comply with the principles of universality and equality. The model for implementing universal suffrage in 2020 should comply with these two principles.”

Explain whether it is possible to modify functional constituency elections so as to make them compatible with the principles of universality and equality. Support your view in light of the provisions of the Basic Law, the relevant decisions of the Standing Committee of the National People’s Congress and the International Covenant on Civil and Political Rights (ICCPR).

Question Three (50 marks)

HKSAR v. Ng Kung-siu and another [2000] 1 HKC 117 is one of the important decisions of the Court of Final Appeal of the HKSAR concerning the Basic Law.

Give your views on whether the case was rightly decided, and review the constitutional significance and implication of this case.

Question Four (50 marks)

Article 74 of the Basic Law provides that: *“Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.”*

Rule 51(3) of the Rules of Procedures of the Legislative Council of the HKSAR provides that it is up to the President of the Legislative Council to decide whether a bill presented by a member of the Legislative Council relates to *“public expenditure or political structure or the operation of the Government”*.

Apply the purposive approach of interpretation to argue whether Rule 51(3) of the Rules of Procedures of the Legislative Council of the HKSAR contravenes Article 74 of the Basic Law.

PCLL Conversion Examination
5th January 2010
Examiner's Comments
Hong Kong Constitutional Law

1. For Question 1, students are expected to provide an understanding of "One Country Two Systems" and autonomy and to analyze how involved and how active the role of the Central Government should be in the governance of internal affairs in the HKSAR on the basis of these understandings. Students are expected to refer and analyze incidents happened in Hong Kong since 2003 especially the development of the political system of the HKSAR to support his/her arguments.
2. The overall performance of students answering Question 1 is satisfactory. Most students were able to demonstrate adequate understanding on One Country Two Systems and the high degree of autonomy enjoyed by Hong Kong.
3. For Question 2, students are expected to refer to Article 45, Article 68, Annex I, Annex II, Interpretation of the SCNPC in 2004, decisions of the SCNPC in 2005 and 2007, Article 25 of the ICCPR and the General Comment 25 by the Human Rights Committee under ICCRR. Students are expected to explain the basic features of functional constituencies and the requirements of universality and equality. Students may suggest some alternative models of functional constituency elections like expanding the electorate base of functional constituency, setting up new functional constituencies including all voters, or allowing functional constituencies to nominate candidates to be elected by all voters. One important issue that students should discuss is whether the equality principle applies only to the number of votes each citizen can have or also to the weight of each vote.
How far does it apply?
5 super FCs
Lee Ming Li can never have equal size, but huge variation
Focus on issue of equality
→ purposive approach to equality - small vs large cons.
4. The overall performance of students answering Question 2 is not satisfactory. Many students had only considered the political feasibility of modifying the functional constituencies but had not approached the question from the perspective of constitutional design which should be the focus of the question.
5. For Question 3, students are required to provide a summary of the fact of the case concerning the compatibility of s. 7 of the National Flag Ordinance and s. 7 of Regional Flag Ordinance with Art. 19 of the ICCPR. Students are expected to

critically analyze the following issues: (a) the constitutional status of the ICCPR and its relationship with Article 39 of the Basic Law and the HKBORO; (b) the form of limitation on freedom of expression by the legal provisions; (c) *ordre public* as the legitimate aim in limiting freedom of expression and the application of this concept to the protection of the Flags; (d) whether the limitation imposed on freedom of expression was necessary and proportionate.

6. The overall performance of students answering Question 3 is satisfactory. Most students can demonstrate an adequate understanding of the case and provide an adequate analysis on the significance of the case.
7. For Question 4, students are required to explain the purposive approach of interpretation as elaborated by the Court of Final Appeal in *Na Ka Ling*. In applying the approach to the question, students should analyze whether the “executive-led form of government”, “the Government of the HKSAR must be accountable to the Legislative Council”, “the Legislative Council shall be the legislature of the HKSAR,” or “separation of powers” are the primary purposes of the Basic Law and how far these principles may determine whether Rule 51(3) of the Rules of Procedures of the Legislative Council of the HKSAR contravenes Article 74 of the Basic Law.
8. Most students performed badly in this question. Most students cannot identify the relevant purposes of the Basic Law including “executive-led form of government” and “separation of powers.” Some students failed even to provide an explanation of the purposive approach.

PCLL Conversion Examination June 2010

Hong Kong Constitutional Law

Question One (50 marks)

Five councilors from pan-democrats camp resigned from the Legislative Council. This has led to a by-election, which they hope would be seen as a “de facto referendum” on full democracy. On the basis of the public law principle that if there is no authorization to do something, then it is forbidden, Li Fei, vice chairman of the Legislative Affairs Commission of the National People’s Congress, alleged that such a move is illegal as the Basic Law makes no mention of referendum.

Give your views on the legality of the “de facto referendum” and the constitutional implication if the “de facto referendum” is illegal. You are required to consider the issues on the basis of the nature, the purpose and the text of the Basic Law.

Question Two (50 marks)

“On the basis of the principle of separation of powers enshrined in the Basic Law, the President of the Legislative Council should not vote in the passage of any motion, bill or amendment in the Legislative Council.”

Explain, giving reasons, whether you agree or disagree with the views expressed above.

Question Three (50 marks)

Article 68 of the Basic Law provides that:

“The method for forming the Legislative Council shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by *universal suffrage*.”

Apply the purposive approach of interpretation to determine the specific requirements of “universal suffrage” provided in Article 68 of the Basic Law and analyze whether the existing form of functional constituencies is compatible with these requirements.

Question Four (50 marks)

Leung Tai Hung is a member of the Legislative Council of the HKSAR. He drafted a bill on fitness exercises. The title of the Bill is "Citizen Fitness Bill." The long title of the Bill provides that: "An Ordinance to provide for promoting citizens to carry out fitness exercises." A major provision of the Bill is to set the 8th day of August every year as the City Fitness Day.

Leung gave notice to the Legislative Council in accordance with Rule 51(1) of the Rules of Procedures of the Legislative Council of the HKSAR of his intention to present a bill. According to Rule 51(3) and 51(4) of the Rules of Procedures of the Legislative Council of the HKSAR, the President of the Legislative Council ruled that the Bill does not relate to "public expenditure or political structure or the operation of the Government" and "Government policies". The bill was then published in the Gazette.

The Government of the HKSAR questioned the authority of the President of the Legislative Council to rule on whether a bill is related with "public expenditure or political structure or the operation of the Government" or "Government policies". The Government of the HKSAR asserted that this power is vested in the Chief Executive of the HKSAR in accordance with Article 74 of the Basic Law and the constitutional principle of "Executive-led form of government". The Government of the HKSAR also disagreed with the decision of the President of the Legislative Council that the Bill did not relate to "public expenditure or political structure or the operation of the Government" and "Government policies".

Who has this power?

② Wrong use of LEGG president's power.

The Government of the HKSAR applied for judicial review to challenge the authority and decision of the President of the Legislative Council.

You are the judge of the Court of First Instance hearing this case. Write the judgment.

PCLL Conversion Examinations

June 2010

Examiner's Comments

Hong Kong Constitutional Law

1. For Question 1, students are expected to (a) explain the meaning of “de facto referendum” including the resignation of 5 legislative councilors and their claim that the by-election is a form of referendum for Hong Kong people to decide whether they support the continuation of functional constituencies; (b) analyze whether there is such a public law principle that if there is no authorization to do something then it is forbidden; (c) analyze the nature of the Basic Law on whether it is a public law; (d) analyze the purposes of the Basic Law by referring to provisions of the Basic Law on whether “de facto referendum” is authorized by the Basic Law; (e) analyze whether the Basic Law prohibits a legislative councilor from resigning and taking part in the by-election (Article 79); and (f) analyze whether the Basic Law prohibits a candidate in a by-election to claim that the by-election is a referendum.
2. The overall performance of students answering Question 1 was not satisfactory. Many students failed to give sufficient attention to the “de facto” nature of the referendum in determining its legality.
3. For Question 2, students are expected to: (a) analyze whether the Basic Law enshrines a constitutional principle of separation of powers; (b) analyze whether the principle of separation of powers requires the President of the Legislative Council not to vote in the passage of any motion, bill or amendment in the Legislative Council; and (c) analyze whether the President not voting in the Legislative Council can be derived from other sources like constitutional convention.
4. The overall performance of students answering Question 2 was not satisfactory. Many students just provided a general analysis on the political system of the HKSAR or the principle of separation of powers as enshrined in the Basic Law without addressing the question whether the voting arrangement of the President of the LegCo could be derived from the principle of separation of powers or other constitutional principles and sources.

5. For Question 3, students are expected to (a) explain the purposive approach of interpretation as elaborated by the Court of Final Appeal in *Na Ka Ling*; (b) apply the approach to interpret “universal suffrage” explaining why certain specific requirements can be derived from such interpretation; (c) refer to the literal context of the Basic Law in ascertaining the meaning of universal suffrage, in particular Article 25 of the International Covenant on Civil and Political Rights; (d) consider specific requirements like no. of votes enjoyed by every elector, weight of each vote enjoyed by every elector and the conditions on the eligibility of candidates; (e) explain the existing form of functional constituencies; and (f) explain whether existing form of functional constituencies can satisfy those requirements.

6. The overall performance of students answering Question 3 was not satisfactory. Many students failed to give sufficient account to the specific requirements on the form of election prescribed by universal suffrage on the basis of the purposive approach of interpretation. Many answers wrongly put the on the pace of democratic development of the political system of the HKSAR. Also, many students failed to mention Article 25 of the International Covenant on Civil and Political Rights as the literal context in ascertaining the meaning of universal suffrage in the Basic Law.

purposive approach

7. For Question 4, students are expected to: (a) interpret the provisions of the Basic Law to determine whether the President of Legislative Council has the authority to rule on whether a bill is related with “public expenditure or political structure or the operation of the Government” or “Government policies”; (b) analyze how the principle of “executive-led form of government” can be applied to determine whether the President has the authority; (c) whether there is any contradiction between Rule 51(3) and 51(4) of the *Rules of Procedures of the Legislative Council of the HKSAR* and Article 74 of the Basic Law; (d) explain the nature and the possible scope of the “Citizen Fitness Bill”; (e) interpret “public expenditure or political structure or the operation of the Government” or “Government policies” mentioned in Article 74; and (f) analyze whether “Citizen Fitness Bill” is within the meaning of “public expenditure or political structure or the operation of the Government” or “Government policies”.

Who has the power?

Executive-led gov't vs. Separation of powers.

Was the president wrong?

8. The overall performance of students answering Question 4 was not satisfactory. Many students just gave an analysis on the relationship between the executive authorities and the legislature in the HKSAR in general without addressing the

specific issues raised in the question. Also, some students just addressed the issues concerning the power of the President of the LegCo and missed or gave insufficient attention to the issues concerning the constitutionality of the "Citizen Fitness Bill".

PCLL Conversion Examination January 2011

Hong Kong Constitutional Law

Question One (50 marks)

✓ made by China, relevant to China
Sets rules of governing
→ cons-like.
"The Basic Law is a national law and is the constitution of the region."
Ng Ka-ling v Director of Immigration [1999] 1 HKC 323

Comment on the above statement made by CFA.

T/F?

Question Two (50 marks)

The Basic Law regulates the relationship between the HKSAR and the central authorities and distributes powers to be enjoyed respectively.

You are now invited to give a lecture on the relationship and the division of powers between the HKSAR and the central authorities to a group of mainland students who are currently visiting the judicial institutions of Hong Kong, in which you are specially required to identify the autonomous powers exercised by the HKSAR under the principle of "high degree of autonomy".

Please write your speech with reference to any constitutional theory and relevant provisions of the Basic Law.

Question Three (50 marks)

In *HKSAR v Ma Wai Kwan David* decided on 29 July 1997, Chan J, the then Chief Justice of the High Court, stated the following under "Jurisdiction of the Courts":

"In the context of the present case, I would accept that the HKSAR courts cannot challenge the validity of the NPC decisions or Resolutions or the reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts."

[1997] 2 HKC 335

VS
In *Ng Ka-ling v Director of Immigration*, the Court of Final Appeal (CFA) unanimously decided, under "Constitutional Jurisdiction of the Courts" that:

"What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the NPC or its Standing Committee (which we shall refer to simply as "acts") are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found."

"In our view, this conclusion of the Court of Appeal as to the jurisdiction of the Region's courts is wrong."
[1999] 1 HKC 323, 324

In the light of the relevant provisions of the Basic Law and the theory of court jurisdiction:

Do together

- reasons for
- (a) Discuss the scope of the HKSAR courts' constitutional jurisdiction as expounded in *Ma Wai Kwan David and Ng Ka-ling*; (20 marks)
- (b) Critically assess the courts' positions. (30 marks)
- T/P?

Question Four (50 marks)

During the recent celebration of the National Day of the PRC, Henry Leung and Kathy Ng from the pan-democracy camp clashed with the demonstrators from the pro-Beijing camp. The angry Henry and Kathy defaced the portrait of Wen Jiabao, Premier of the State Council, and then burned the National Flag. They are now charged by the police for disturbing public order.

Shortly after the event, the State Council instructed the Chief Executive to consider enacting a legislation to implement Art. 23 of the Basic Law on the ground that there is an actual need to enact the law to prevent people from subverting the central government in Hong Kong.

- (a) As the lawyer of Henry and Kathy, how will you defend their rights with reference to the relevant legislation and cases; (20 marks)
- (b) The Secretary for Justice invited you to advise him on the State Council's instruction to enact a legislation to implement Art 23. Please prepare the memo. (30 marks)

Q.3

- ① Relevant BL Provisions - Art 19, esp 19(2) - jurisdiction of courts unchanged across 1997 (also in Art 81(2)).
Art 80 - courts exercise judicial power
- End of Examination Paper -

Ma Wai Kwan

CA concluded NO jurisdiction to question acts of NPC and its SC. Because of Art 19(2) - continuity in lack of jurisdiction from when HK was a British colony.

- Critically assess: • Too simplistic, widely criticised - HK no longer colony
• can't use this as reason for conclusion.
• other reasons to reach same conclusion? Distinguish from CA's

Ng Ka Ling

CofA concluded jurisdiction to question acts of NPC because part of judicial power of courts under HKBL - Art 19(1) + Art 80: • part of HK's high degree of autonomy - Art 159(4).
• checks & balances - judicial review - Rule of Law
• HKBL is a constitution

- Critically assess: • Constitution? X National law, NOT cons, under PRC legal system.
• Explain followed by Ng Ka Ling (No. 2)

CONCLUSION

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:

Summarise.
in brief

- A/4
- 13 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. 15
- 18
- 158
- 159 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. 17(3)
100(1)
- specific examples*

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 unnecessariness of such legislation; (10 marks) - *is there an actual need? Adequate existing legislation*
- 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).

PCLL Conversion Examination June 2011

Hong Kong Constitutional Law

Question One (50 marks)

In David Ma WK, Chief Judge Chan of High Court opined that:

HK
The Basic Law [of the HKSAR] is a unique document, reflecting a treaty made between two nations. It deals with the relationship between the Sovereign and an autonomous region which practices a different system. It stipulates the organisations and functions of the different branches of government. It sets out the rights and obligations of the citizens. It has at least three dimensions: international, domestic and constitutional. [Emphasis added by the examiner.]
[1997] HKLRD at 772

international
China
domestic

Constitutional

Critically comment on the remark of “three dimensions” given by the Chief Judge. Support your arguments with the theory of the Basic Law and with reference to the history of the Basic Law-making.

Question Two (50 marks)

In *HKSAR v Ng Kung Siu & Anor*, the CFA has made it clear that:

“Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong’s system and way of life.”

HKSAR v. Ng Kung Siu & Anor [2000] 1 HKC 117, at p. 135 A.

As regards the protection of freedom of expression, Article 27 of the Basic Law defines that:

“Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”

Art 39 of the Basic Law further states that:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

← The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

Legality Test.

Necessary Test

After the handover, a series of important cases have been decided by the courts of the HKSAR, including but not limited to *HKSAR v. Ng Kung Siu & Anor* [2000] 1 HKC 117, *Leung Kwok Hung & Ors v. HKSAR* (2005) 3 HKLRD 164, and *Yeung May Wan & Ors v. HKSAR* (2005) 2 HKLRD 212.

- example of court's emphasis on protecting fundamental freedom.

Critically examine the extent to which freedom of expression could be restricted, and the relevant tests that the courts could apply in adjudicating disputes as to the scope of the freedom of expression.

- ① Legality
- ② Necessity
- ③ Proportionality.

Question Three (50 marks)

In the Court of First Instance case of *Intraline Resources SDN BHD v. The Owners of the Ship or Vessel "HuaTian Long"*, commonly known as "HuaTian Long" (*HuaTian Long* (No 3) [2010] 3 HKC 557), the Court ruled that the common law doctrine of Crown immunity continues to subsist in the HKSAR after the resumption of sovereignty over Hong Kong by the PRC. As a result, the courts of the HKSAR do not have jurisdiction over the Central People's Government ("CPG") and any body corporate established thereunder which is controlled by the CPG and exercises its functions.

The factual background can be summarized, for the purpose of the examination, as follows:

This action arose out of an alleged breach of contract by Guangdong Salvage Bureau ("GSB"), the owners of the vessel "HuaTian Long" ("the Vessel"), for failing to honour its commitment under a Memorandum of Agreement to make the vessel available to Intraline Resources SDN BHD ("Intraline") for offshore projects in Malaysia and Vietnam. Intraline invoked the Admiralty jurisdiction of the High Court (of the HKSAR), and successfully arrested the Vessel in Hong Kong waters. Having furnished bail and thus securing the release of the Vessel by a court order, GSB applied for a stay or dismissal of the action on the ground that it, being a bureau of the Ministry of Communications ("MOC") of the CPG, enjoyed sovereign or Crown immunity. In court, Intraline contended that GSB is a state-owned enterprise ("SOE") with separate legal identity; GSB contended that it is just another name for the Guangzhou Salvage Bureau of the Ministry of Communications ("GSBMOC"), which is an institutional unit under the direct control of the MOC.

This case is believed to have "far-reaching implications" (citation of an article published in *Hong Kong Lawyer*, issue November 2010). Questions about this court decision have been raised by legal scholars and the public as to:

- (i) the rationale and justification of the survival of the common law doctrine of Crown immunity in Hong Kong after the handover of sovereignty in 1997; (10 marks)
- (ii) whether the right to immunity should be transferred to the new sovereign power, the PRC, acting through the CPG and its instrumentalities; (15 marks)
- (iii) whether a party can lodge a civil claim before the Hong Kong court against a Chinese state entity engaging in commercial transactions; and (10 marks)
- (iv) In addition to these, whether the right to immunity may also restrict the jurisdiction of the courts of the HKSAR. (15 marks)

You are invited to put forward your pros and/or cons opinions and make critical comment on the above issues.

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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:

- Int'l
- 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.
- Domestic
- 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.
- Constitutional
- 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

continuity
(no applied to
HK) - NOT
the reservations
ICCPR/

(ICCPR).

Art 19 ICCPR/
Art 16 BOR

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.

PCLL Conversion Examination January 2012

Hong Kong Constitutional Law

Question One (50 marks)

In *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC*, FACV Nos. 5, 6 & 7 of 2010 (Civil), the Court of Final Appeal sought an interpretation from the Standing Committee of the National People's Congress on provisions of the Basic Law in accordance with Article 158(3) of the Basic Law.

Are the conditions provided in Article 158(3) of the Basic Law for making a reference to the Standing Committee of the National People's Congress for interpretation satisfied in this case? Explain with reasons.

Topic b.

Question Two (50 marks)

"In brief, the ideal of constitutionalism prescribes that governmental powers should be limited by constitutional mechanisms including (1) the rule of law, (2) separation of powers, (3) autonomous arrangements, (4) democratic election and (5) bill of rights, so as to protect the fundamental rights of citizens."

In accordance with this understanding of constitutionalism, how far is constitutionalism attained in Hong Kong through the Basic Law? Support your answer with reference to TWO relevant provisions of the Basic Law concerning EACH of the FIVE constitutional mechanisms for maintaining constitutionalism mentioned in the quotation and the actual application of these provisions.

Question Three (50 marks)

When there is a vacancy in the Legislative Council, it is proposed that the vacancy concerned will first be filled by the first candidate who has not been elected on the same list as that of the vacating Member of the Legislative Council. If that candidate is ineligible or unwilling to fill the seat, the vacancy will be filled by the next candidate on the same list, and so on (i.e. the same list arrangement). When there is no more candidate on the same list who is eligible and willing to fill the vacancy, the vacancy will be filled by reference to the precedence list, i.e. the list of the first candidates who have not been elected on each of the lists with remaining votes at the previous general election, ranked in descending order according to the number of remaining votes of their respective lists (i.e. the fallback arrangement). Finally, if the vacancy cannot be filled by the above methods, a by-election will be held.

Is this proposal compatible with the Basic Law and the Bill of Rights? Give reasons to support your answer.

Question Four (50 marks)

"The primary purpose of the Basic Law, which is to preserve a particular kind of economic and political system in Hong Kong, differs from other instances of autonomy. Autonomy is secondary, and is contingent on the other, larger aim... This factor points to an important distinction between autonomy in Hong Kong and almost everywhere else: the purpose of autonomy elsewhere is to safeguard religious or ethnic traditions of a minority (India, Sri Lanka, Cyprus) or to accommodate a pre-existing sovereignty entity... The moral basis for autonomy is weak if its justification is economic, unlike religion, culture or ethnicity (especially as the economic paradigms of the two parts of China converge increasingly)."

Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (HKU Press, 2nd edition 1999), pp. 184-185.

**Do you agree with Yash Ghai's understanding of autonomy enjoyed by Hong Kong?
Give reasons to support your answer.**

- End of Examination Paper -

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1. For Question 1, students are expected to:

(a) refer to the conditions for making a reference to the Standing Committee of the National People's Congress for interpretation under Article 158(3) of the Basic Law - before making their final judgement which are not appealable, the classification condition (involving the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the HKSAR), and the necessity condition (the interpretation will affect the judgement on the cases (10 marks);

Ng Ka Ling,
Chong Fung
Yuen.

(b) illustrate the provisions of the Basic Law involved in *Democratic Republic of the Congo and Others v. FG Hemisphere Associates* are Article 13(1) and Article 19; and analyze whether these provisions can satisfy the classification condition (20 marks);

YES.

(c) analyze whether the interpretations on these provisions can satisfy the necessity condition (20 marks).

are these necessary to decide the case?
Court split 3-2. Explain both sides & reach a conclusion.

2. The overall performance of students answering Question 1 was satisfactory. Most students can identify the conditions for making a judicial referral and explained why and how the issues in the Congo case satisfied the conditions.

3. For Question 2, students are expected to:

(a) make reference to at least 2 articles of the Basic Law concerning each of the five constitutional mechanisms mentioned in the quotation, i.e. the rule of law, separation of powers, autonomous arrangements, democratic election and bill of rights so as to protect the fundamental rights of citizens (10 marks);

(b) explain how the articles of the Basic Law referred in (a) are related to the relevant constitutional mechanisms (10 marks);

(c) illustrate how far constitutionalism, i.e. limiting governmental powers to protect the fundamental rights of citizens in the Hong Kong Special Administrative Region, is achieved by the articles referred to in (a) (15 marks);

(d) support the analysis in (c) with constitutional events happened in HK in the

past years (15 marks).

4. The overall performance of students answering Question 2 was satisfactory. Most students can identify the relevant articles relevant for each of the five aspects of constitutionalism in Hong Kong and provide an adequate analysis.
5. For Question 3, students are expected to:
 - (a) refer to Article 26 and Article 39 of the Basic Law (5 marks);
 - (b) refer to Article 25(b) of the International Covenant on Civil and Political Rights and explain that the right "to vote and to be elected at genuine periodic elections by universal and equal suffrage and by secret ballot" is to guarantee the free expression of the will of the electors (15 marks);
 - (c) analyze the proposal to illustrate whether electors' free expression of the will are guaranteed especially on the filling the vacancy by the precedence list (20 marks);
 - (d) illustrate the problem of "one-person-list", i.e. there is only one person in the list. According to the proposal, if a Legislative Councilor from a one-person-list resigned, as there will be no other candidate in the same list to fill the vacancy, the vacancy must then be filled by reference to the precedence list (10 marks).
6. The overall performance of students answering Question 3 was not satisfactory. Many students only provided a general analysis of the election system of Hong Kong and universal suffrage. They failed to consider whether the specific suggestions in the proposal like the same list arrangement and the precedent list arrangement can guarantee the free expression of the elector's will.
7. For Question 4, students are expected to:
 - (a) illustrate the understanding of Hong Kong's autonomy by Ghai is that *the primary purposes of the Basic Law is to preserve a particular kind of economic and political system in Hong Kong but not like other autonomous entities for safeguarding religious or ethnic traditions of a minority or to accommodate a pre-existing sovereignty entity* (10 marks);
 - (b) explain whether this understanding correctly captures the essence of Hong Kong's autonomy (15 marks);
 - (c) illustrate Ghai's view *that the moral basis for Hong Kong's autonomy is weak because its justification is economic especially as the economic paradigms of the two parts of China converge increasingly* (10 marks);

National
Autonomous
Areas

Heavy emphasis on economic provisions in JD & HKBL

Debate over future of HKD (Art 111 of HKBL)

(d) review whether an economic basis for Hong Kong's autonomy is too weak to sustain Hong Kong's autonomy (15 marks).

8. The overall performance of students answering Question 4 was not satisfactory. Many students just gave a general analysis on Hong Kong's autonomy without addressing the central messages in Ghai's understanding on Hong Kong's autonomy, i.e. the relationship between its moral basis (mainly economic consideration) and its sustainability.

(a) HK differs from other examples of autonomy
e.g. National Autonomous Areas
(Art 112-122 PRC Constitution 1982).

(b) Is this true about HK?
Answer by reference to specific provisions in JD and HKBL.
Art 2, 5, 107, 108. 5, 6, 7, 8, 9

c) Consider how circumstances have changed since drafting of HKBL - Art 111 (RMB).

d) Conclusion - ↑ intervention by China as HK's econ. value declines?