

PCLL Conversion Examination
June 2019
Examiner's Comments
Hong Kong Constitutional Law

I make the following comments on the examination in Hong Kong Constitutional Law and some observations on the examination scripts of candidates which I graded.

Question 1

This question required candidates to consider the extent to which the Basic Law of the Hong Kong SAR embodies the fundamental values of constitutionalism. These values (at least) include the rule of law, independence of the judiciary, separation of powers, limited government (in the sense of government according to law), the protection of human rights, access to the courts (particularly for judicial review of government action), and free and fair elections of government/legislatures. Logically, as a starting point, answers should have identified some or all of these values.

Answers might then consider the provisions of the Basic Law against the identified principles of constitutionalism. There is much scope here to display a good knowledge of the Basic Law. For example, answers could discuss the human rights guaranteed by the Basic Law (and also the HK Bill of Rights Ordinance) and the high level of protection which the courts have given these rights since 1997. Answers could also emphasise the independence of the judiciary in HK, the presence on the CFA of an overseas non-permanent judge, the growing case law on judicial review (especially related to human rights – eg recent cases related to same sex marriage) and how this all fits into a core meaning of the rule of law. Protections in the Basic Law for HK's judicial system and common law legal remedies might also be mentioned.

Good answers would discuss the concept of the separation of powers and whether the Basic law complies with this. While the Basic Law was not originally intended to comply with the separation of powers, and the HK government was to be an executive led government, as things have turned out, the separation of powers has become an important feature of the Basic Law, though there is still some resistance to this in some academic quarters.

Good answers would also mention problems for constitutionalism presented by article 158 of the Basic law and the role given to the Standing Committee of the NPC. However, this is not the main focus of this question and it should not be given too much time. One reason for this is that civil law systems which have a similar approach to 'interpretation' of the law by a legislature can still comply with the principles of constitutionalism. In other words, common law systems are not the exclusive preserve of constitutionalism. Rather, the problem presented by the NPC is that it is not 'democratically' elected by or accountable to HK people, it can 'override' judicial interpretations of the law (potentially with retrospective effect) and its powers appear to be unlimited. All of these present significant problems for the rule of law and constitutionalism.

The best answers would also briefly consider the development of democracy in HK (eg elections to Legco, the functional constituencies and 'election' of the CE). In turn,

this requires consideration of whether direct democracy is crucial for constitutionalism. Even if that question cannot be answered objectively, it might be observed that experience suggests that the better a democracy, the better protected are the principles of constitutionalism. But there are alternatives, where a strong, independent judiciary and an effective system of judicial remedies can make up for inadequate (or failing) political institutions and that in many ways, HK is one of these.

The answers to this question given by candidates were generally of a high standard. Many answers showed detailed knowledge of the Basic Law, the relevant doctrines and recent developments. Some weaker answers did not sufficiently cover the material or demonstrated a poor grasp of recent case law and developments.

Question 2

This question required candidates to consider the constitutionality of a fictitious proposal of the central peoples government (CPG) of the PRC to create a new environmental agency with jurisdiction over all China, including Hong Kong. Particular features of the scheme included immunity of the agency from Hong Kong jurisdiction, no remedies against its decisions in HK courts and exclusive jurisdiction of PRC courts to hear challenges to its decisions, even where, for example, property rights in HK were affected by its decisions.

Good answers highlighted the proposal's interaction with provisions of the Basic law, such as the protected jurisdiction of HK courts over all HK cases and that these should be decided according to common law principles. The proposal appears to derogate from these provisions and therefore is likely to be in breach of the Basic law. This raises the difficult question about the powers of the CPG over HK and what is meant by the limitations of central powers under the Basic law to foreign affairs and acts of state. The best answers considered that this was a problem of characterisation of powers, as in other constitutional systems, and that, ultimately, this might be a matter of interpretation for the Standing Committee of the NPC. Given that the proposal was about climate change (and therefore an international problem), there was at least in theory the possibility that it could be characterised as concerning foreign affairs. If so, it is still relatively unexplored whether there are any limitations on the powers of the NPC, such as under principles of proportionality, to limit the intrusion into HK affairs under the Basic Law to the minimum necessary to achieve the CPG's legitimate objectives.

The best answers also considered this problem in light of the issues surrounding the new West Kowloon train station. It appears from this experience that the NPC can 're-designate' parts of the geographical area of HK so that mainland PRC law applies there. If so, the question then is whether this power is limited to geography or whether it is wider, such that particular areas of law and governmental action can also be 're-designated'. Answers would mention the recent CFI decision in *Leung Chung Hang Sixtus v. President of Legco* [2018] HKCFI 2657 in which the arrangements at West Kowloon were upheld as compatible with the Basic law, but then distinguish the case on the basis that it appears to turn on the limited purposes and objects of the challenged proposal. In contrast, in this proposal there is a root and branch derogation

from the powers and jurisdiction of the HK courts, with mainland PRC law applied to rights and duties arising in HK.

Fewer candidates attempted this question compared with questions 1 and 3. However, many of those who did so gave good answers. The best candidates, in addition to covering most of the matters mentioned already, highlighted the precedent of the Garrison law but noted that even there, HK law and even jurisdiction were preserved for some purposes. In contrast, weaker answers decided to look at the problem only from the standpoint of its impact on human rights, notably the protection of private property rights, and did not discuss the fundamental constitutional problems raised, in particular, the complex interaction of governmental powers under the one country, two systems arrangements.

Question 3

As in previous examination papers in this subject, this question required candidates to offer a detailed and considered discussion of the background to and purposes of article 158 of the Basic law, followed by a systematic discussion of the five occasions on which the NPC SC has rendered interpretations and also the judicial consideration of article 158.

The best answers systematically considered the background to and implications of the five interpretations and how the HK courts have approached article 158, such as in cases from *Ng Ka Ling* onwards.

The best answers approached the question systematically, giving a detailed context for the various cases and interpretations. Weaker answers limited themselves only to discussing early cases, such as *Ng Ka Ling*, and did not set out the later interpretations. This suggested that they had not updated their knowledge to take account of more recent developments.

One feature of weaker answers to this question was that some resorted to note form and brief bullet points in order to provide an answer. It may be that this was because of time constraints in a second answer. It cannot be stressed often enough that candidates must allocate an equal amount of time to each question. Full marks will not be awarded to answers which, for example, mention the well-known name of an interpretation (“Congo interpretation”) but say no more about it. This is not answering the question in a way so as to demonstrate to the examiners the level of knowledge required to pass this subject.