

**PCLL Conversion Examination
January 2018
Examiner's Comments
Hong Kong Constitutional Law**

Question 1

For the sub-question 1:

Students are expected to:

- A. First of all, answer if the HKSAR government is an executive-led government OR a government of separation of powers; (5 marks)

- B. Then, critically analyse the implications of Zhang Xiaoming's stance that the HKSAR is an executive-led government, such as concentration of power and disproportionateness of governmental branches, omnipresence and ubiquitousness of executive power, possible interference of the Chief Executive with the Judiciary, decrease of democratization of legislature, etc.; (10 marks)

- C. And, evaluate the far-reaching impact on the operation of the Government. This can be shown by, in addition to the above signs, the direct intervention of the central authorities in the HK affairs and the shrinking of autonomous powers that the HKSAR now enjoys. (5 marks)

For the sub-question 2:

- A. First, generally describe the relationship between executive, legislative and judicial powers based on the provisions of the Basic Law; (15 marks)

- B. Provide an in-depth analysis of some features of this relationship by referring to case law including but not limited to *Leung Kwok-hung* and *Cheng Kar-shun*, etc., and identify the principles governing the mutual relations among them which include the separation of powers and non-intervention, etc. (15 marks)

The Question aimed to test student's comprehensive understanding of the HKSAR's political structure and its operation.

The major problem is that in most cases, students answered this question in a very descriptive way, which means that the answer lacked sufficient relevant and in-depth analysis and critical observations, and some of which simply listed the articles of the HK Basic Law, with very limited reference to relevant authorities and case law, even without them at all.

Many didn't answer sub-questions properly and made no distinction between sub-questions.

Lastly, sometimes cases were cited but misplaced in the answer.

Question 2

This is almost an open-answer question and students can freely develop the answer. However, students are expected to:

1. Give an understanding of the concept. Although there is actually no standard answer, students should understand what the White Paper wants to express by this statement, and tell what rationale is behind it. (10 marks)
2. Obviously comprehensive jurisdiction of the central authorities, if implemented as the central authorities so wish, would impair the exercise of the high degree of autonomy. Students should analyse why or why not. (20 marks)
3. Referring to the generic theory of the Basic Law, the provisions of the Basic Law, and if possible, case law, critically answer Henry's query. (20 marks)

The question, which is not an easy one, was meant to challenge the scope and depth of students' knowledge and to test if they have critical mind.

It turned out that first, not many chose this question, and for those who have chosen it, not many really understood it thoroughly. Secondly students didn't demonstrate much critical thought and answered the question explicitly and plainly, and some simply got confused. For example, they often failed to clearly articulate the inherent conflict between comprehensive jurisdiction of the central authorities and autonomous powers of the HKSAR.

In the end and generally speaking, the knowledge demonstrated in the answer looked very pale and limited.

Question 3

Students are expected to:

- A. Explain the rationale: (20 marks)
 - a. Chinese constitutional system regarding law interpretation requires that the interpretation of the Basic Law shall be vested in the NPCSC since the Basic Law is a national law;
 - b. Under the principle of One Country Two Systems and the Basic Law, the general power of interpretation (and amendment) shall be held by the NPCSC;
 - c. Under the Basic Law (arts. 8 and 19), common law survives the handover and shall continue, including the system of judicial interpretation of statute;
 - d. As a matter of fact, the courts of the HKSAR can actually interpret every provision of the Basic Law under the principle of High Degree of

Autonomy and in accordance with the built-in statutory interpretation system of common law;

- e. In *Lau Kong-yung*, the Court of Final Appeal has confirmed the power of interpretation of the NPCSC and the authority of its interpretation.

B. Discuss the nature of the power of interpretation of the NPCSC; (5 marks)

Note: students should base their answer on the Chinese constitutional law, and:

- a. Discuss the legislative nature of the interpretation of the NPCSC due to the fact that the NPCSC is an organ of state power as well as state legislature;
- b. State that the interpretation of the law in China is a part and parcel of the legislative process.

C. Identify the conditions for the Court of Final Appeal to make judicial reference to the NPCSC, with reference to Article 158 (3) and *Ng Ka-ling*; and analyse whether and how these conditions are satisfied. (25 marks)

Note: students should discuss the following elements:

- a. Judicial process (non-appealable);
- b. Provisions/issues regarding matters outside the autonomy and relationship between the central authorities and the HKSAR which need to be clarified by the NPCSC;
- c. CFA's jurisdiction to make reference; and
- d. The Basic law Committee's involvement.

Students generally understood the parallel / dual track system of the interpretation of the Basic Law under the Basic Law and Chinese Constitution.

The major problem with the answers is that students didn't understand the nature of the NPCSC interpretation and the actual interpretive power of HK courts, and didn't know well how to apply "the conditions" and tests developed in HK case law. In this relation, the inner logic of the Article 158 was not fully or correctly understood by students.

In short, many answers didn't demonstrate a comprehensive, thorough and logic understanding of the question on the whole and lacked correct analysis and proper application of case law.

A General Note to All Answers [based on one examiner's individual report]:

A relatively high number of students failed to give any response to some parts of questions which were divided into 2 or more parts. This inevitably dragged down their mark and in some cases was the explanation for a failing grade. Students should take care to answer all parts of a question.

A large number of students also failed to answer the question asked. In particular, in questions 1 and 3, many students elided their answers to one or more parts of the question without clearly distinguishing which part of the question they were answering. This often led to a lack of focus in answers, which appears to the reader as if the question is not actually being answered. The result is that a lower mark is awarded for all parts of the question. Where questions are divided into parts, it is important specifically to answer each part. In this way, students should remain focused on what is relevant to that part of the question.