

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2024 SUPPLEMENTARY INFORMATION PACKAGE

HEAD VI: HONG KONG CONSTITUTIONAL LAW

Contents

- 1. Standards, Syllabus and Reading List**
- 2. Examiners' Comments on the 2021, 2022 and 2023 Examinations**
- 3. Past Examination Papers (2021 to 2023)**

Important: The test paper for Head VI Hong Kong Constitutional Law:

- 1. is open book. Candidates may bring in and refer to any book, document or other written material**
- 2. has a duration of 3½ hours**
- 3. has no specific reading time allocated**
- 4. contains FIVE questions. Candidates should answer any FOUR questions only.**

1. Standards, Syllabus and Reading List

Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Standards, Syllabus and Reading List

STANDARDS

Candidates will be expected:

1. To demonstrate that they have achieved a general understanding of constitutionalism;
2. To demonstrate that they have achieved a general understanding of the status of the Hong Kong Special Administrative Region in the constitutional framework of the People's Republic of China;
3. To be familiar with the interpretation and amendment processes of the Hong Kong Basic Law.
4. To be familiar with the human rights framework of Hong Kong constitutional law.
5. To be familiar with the political structure (including the legislative process) of the Hong Kong Special Administrative Region.
6. To demonstrate that they have achieved a general understanding of the principles of constitutional judicial review of legislation and administrative action in Hong Kong.

Candidates will be expected to have achieved the standard of a newly qualified solicitor who has completed the PCLL and a two-year trainee solicitor contract in Hong Kong, and to be able to provide general legal advice on constitutional issues that may arise in client matters.

EXAM FORMAT

Three Hours and Thirty Minutes Open Book Examination Paper consisting of FIVE Questions.

Candidates should answer FOUR Questions (25% each) out of FIVE Questions.

SYLLABUS

1. Status of HKSAR in the Constitutional Framework of the People's Republic of China

- Constitutional structure of the People's Republic of China;
- Unitary state;
- Sino-British Joint Declaration;
- One country, two systems;
- High degree of autonomy;
- Rule of law;
- Roles of the National People's Congress and its Standing Committee;
- National Security Law of the HKSAR and Safeguarding National Security Ordinance;
- Applicability of Chinese national laws in the HKSAR.

2. Political Structure

- Separation of Powers;
- Executive authorities of the HKSAR;
- Legislative Council;
- Legislative process;
- Executive accountability;
- Selection of the Chief Executive and Legislative Councillors;
- Judiciary;
- Independent judicial power, including power of final adjudication.

3. Human Rights

- Rights and freedoms under the Basic Law;
- Hong Kong Bill of Rights Ordinance (Cap. 383);
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Anti-discrimination legislation in Hong Kong;
- Restrictions on rights and freedoms;
- Proportionality;
- Margin of appreciation.

4. Constitutional Judicial Review

- Judicial review of constitutionality of primary and subsidiary legislation;
- Constitutional remedies;
- Declaration of invalidity;
- Remedial interpretation;
- Suspension of declaration;
- Damages.

5. Interpretation and Amendment of the Basic Law

- The importance of interpretation and the mode of interpretation;
- Interpretation under Article 158;
- Interpretation powers of the NPCSC and the HKSAR courts;
- Judicial referral;
- Principles of, and approaches to, interpretation adopted by the HKSAR courts;
- Amendment under Article 159.

READING MATERIALS

- Michael Ramsden & Stuart Hargreaves, *Hong Kong Basic Law Handbook* (Sweet & Maxwell, 3rd edition, 2022);
- Johannes Chan SC (Hon) & C.L. Lim, *Law of the Hong Kong Constitution* (Sweet & Maxwell Asia, 3rd edition, 2021);
- Danny Gittings, *Introduction to the Hong Kong Basic Law* (HKU Press, 2nd edition, 2016);
- P.Y. Lo, *The Hong Kong Basic Law* (LexisNexis, 2011);
- Stephen Thomson, *Administrative Law in Hong Kong* (Cambridge University Press, 2018);
- Constitution of the People's Republic of China (Adopted at the Fifth Session of the Fifth National People's Congress on 4 December 1982);
- Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong 1984;
- Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by the Seventh National People's Congress at its Third Session on 4 April 1990);

- National Security Law of the HKSAR (including the Implementation Rules for Article 43 of the National Security Law) and other laws of the People's Republic of China listed in Annex III of the Basic Law;
- Interpretations of the Basic Law issued by the Standing Committee of the National People's Congress;
- Decisions on issues involving the Basic Law issued by the National People's Congress and its Standing Committee;
- Safeguarding National Security Ordinance;
- Hong Kong Bill of Rights Ordinance (Cap. 383);
- International Covenant on Civil and Political Rights 1966;
- International Covenant on Economic, Social and Cultural Rights 1966;
- Sex Discrimination Ordinance (Cap. 480);
- Disability Discrimination Ordinance (Cap. 487);
- Family Status Discrimination Ordinance (Cap. 527);
- Race Discrimination Ordinance (Cap. 602).

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2. Examiners' Comments on the 2021, 2022 and 2023 Examinations

OLQE Examiners' Comments 2021

Head VI: Hong Kong Constitutional Law

Question 1:

This question was relatively less popular, being attempted by 62 candidates who sat the exam. It had a pass rate of 76%.

The question asked candidates to advise Raymond on two issues. First, whether the PRC Constitution and the Basic Law are incompatible, and how any inconsistencies and contradictions between the PRC Constitution and the Basic Law are resolved. Second, whether the Sino-British Joint Declaration can be used in litigation to challenge the legality of government action.

Part 1 (carrying 10 marks) was well answered by most candidates. However, on several occasions candidates lost marks because they failed to identify how inconsistencies and contradictions between the PRC Constitution and the Basic Law are resolved. In some cases, this aspect of the question was simply not addressed, or not addressed directly enough, by the candidate. In other cases, the attempted answer failed to identify and/or discuss the mechanisms by which such inconsistencies and contradictions are resolved. Marks were sometimes lost where some such mechanisms were identified but not others. Some candidates denied that there are any inconsistencies and contradictions between the PRC Constitution and the Basic Law, or that they are incompatible, without elaborating on why that is the case or offering supporting evidence. A common omission from answers was reference to the National People's Congress Decision of 4 April 1990 which is directly relevant to the issue raised by the question. Nonetheless, as stated, most candidates gave good answers to this part of the question.

Part 2 (carrying 15 marks) was also generally well answered. Most candidates demonstrated an understanding that the Sino-British Joint Declaration is an international treaty and is not directly actionable in the HKSAR courts, though sometimes this was implied rather than expressly stated in answers. Clarity is always desirable in answers. An encouraging number of candidates correctly identified that the Sino-British Joint Declaration can be used as a pre-enactment extrinsic aid to interpretation of the Basic Law. More surprising was that a greater number of candidates did not identify the relevance of Article 159 of the Basic Law to the potential role of the Sino-British Joint Declaration in litigation in the HKSAR courts. However, strong answers not only identified the relevance of Article 159 of the Basic Law, but also explained the practical obstacles to HKSAR courts enforcing this provision against the NPC. It was not necessary for candidates to speculate on what "recent constitutional law developments in the HKSAR" Raymond may have had in mind when seeking advice.

Additional marks were awarded under both parts of the question where relevant sources and authorities were appropriately cited in support of the answer. Overall, Question 1 was well answered.

Question 2:

This question was one of the most popular, being attempted by 74 of the 78 candidates who sat the exam. It had a pass rate of 76%.

The first part of the question (carrying 10 marks) asked examinees to explain the overall governmental structure of the HKSAR with particular reference to how far it constitutes a system of separation of powers and/or a system of executive-led government. The second part of the question (carrying 15 marks) asked examinees to explain the relationship between the legislative, executive and judicial branches of the HKSAR Government, with reference to actual examples from recent events.

Generally speaking, most of the examinees were able to understand the question and answered correctly with reasoned justifications. However, those who failed or got marginal marks showed one or more of the following shortcomings: Partial or incorrect understanding of the cases, no reference to any authorities such as case law, little understanding of separation of powers as well as a failure to apply the doctrine correctly in the Hong Kong context, and/or a misunderstanding of the meaning of “executive-led government”. Some poorly performing candidates also seemed unfamiliar with the subject of Hong Kong constitutional law altogether.

A specific fault in relation to the first part of the question was an inability to explain why Hong Kong practices a system of separation of powers system by reference to relevant provisions in the Basic Law, and judicial decisions. A specific fault in relation to the second part of the question was a failure to deal with the relationship between the legislative, executive and judicial branches of the HKSAR Government either appropriately or comprehensively.

Question 3

This question was the least popular, being attempted by only 37 candidates. It also had the lowest pass rate at 54%.

This question concerned discrimination on the basis of race. This is the first time that a discrimination question has been asked in a Head VI paper, though the Race Discrimination Ordinance (RDO) and the other discrimination statutes have been on the reading list for some time. Given that this is the first time, a lenient approach to marking was called for.

The question set out a client's story of having been appointed to a teaching position at a tutorial college, only to be effectively terminated before starting on the ground that she didn't look like a native English speaker. A similarly qualified white person was appointed in client's place.

Almost all candidates spotted the obvious racial discrimination and knew that a remedy was available to client. This was considered essential for a pass.

The main comment on the papers of candidates who did poorly (low pass or failure) would be that they did not appear to be aware of the RDO and the Equal Opportunities Commission (EOC). These are the avenues to redress discrimination in the private sector. Such candidates looked mostly to the Basic Law and the Hong Kong Bill of Rights for a remedy. While those constitutional instruments are clearly relevant and do indeed prohibit discrimination on the basis of race, they do not provide an enforceable remedy for private sector discrimination. This omission led some such candidates to suggest judicial review which is only appropriate against government and bodies exercising statutory power. These candidates were given credit for their knowledge of the Basic Law and Bill of Rights as well as judicial review, but it was difficult to give them anything much more than a bare pass if they had not mentioned anything which could actually be useful to the client to seek redress.

The better candidates were aware of the RDO and the EOC as the proper avenues for redress in private sector cases and were generally awarded marks considerably above a bare pass. Some very good candidates explained both the public sector and the private sector avenues to redress in cases of discrimination.

Question 4

This question was one of the most popular, being attempted by 74 of the 78 candidates who sat the exam. It also had the highest pass rate, at 84%, and many of the candidates who failed did so only narrowly.

The question was divided into two parts. In the first part (worth 15 marks), candidates were expected to define 'judicial review' drawing on authority from the Basic Law and case law, including Article 35 and seminal cases on judicial review. At a minimum, candidates were expected to note the power of the courts to review legislative and executive acts according to legal standards and methods of review, including rights under the Basic Law, common law principles, and the proportionality test. Most candidates were able to identify the key features of judicial review, with a smaller percentage offering more critical analysis of the applicable legal standards and methods of review.

The second part (worth 10 marks) required candidates to consider the scope of constitutional remedies: Declarations of invalidity, remedial interpretation, suspensions of declaration and damages. An analysis of the limits to these remedies (an issue which was specifically highlighted in the question) could have focused on the limited scope of damages, although there was some room for argument on this aspect of the question. In contrast to the first part, the answer to this part was generally less satisfactory. Most candidates only partially answered the question, in noting some of the available remedies but not considering any limitations on their use.

Question 5

This question was quite popular, having been attempted by 66 candidates. It also had a relatively high pass rate at 82%.

This question comprised two parts, asking the candidates to prepare a research brief on Article 158 of the Basic Law.

In Part 1 (worth 10 marks) candidates were required to explain the rationale underpinning the allocation of interpretative powers to both the National People's Congress Standing Committee and the Hong Kong courts under Article 158 of the Basic Law. This required close attention to the text of Article 158 and corresponding judicial commentary, such as *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, Ma CJ at [100]. Other cases which were also relevant to the analysis included *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.

In Part 2 (worth 15 marks) candidates were required to engage closely with the five instances in which the NPCSC have rendered an interpretation of the Basic Law, namely in 1999, 2004, 2005, 2011 and 2016 respectively. Candidates had to explain the background leading to these interpretations, the differences between them, and how such interpretations implement the relevant provisions of the Basic Law. There was some room, within the context of discussing how these interpretations implement the relevant provisions of the Basic Law, for argumentation on the nature of these interpretations and whether they ensure fidelity to various constitutional principles in the Basic Law, including 'one country, two systems' and 'judicial independence'.

As evidenced by the high pass rate, candidates generally performed well on both parts of this question with very few bad answers.

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OLQE Examiners' Comments 2022

Head VI: Hong Kong Constitutional Law

Question 1

This question was the most popular, being attempted by all 69 candidates who sat the exam. It had a pass rate of 93%.

This question was divided into three parts and required candidates to prepare a written speech to be delivered as a presentation to a group of visiting lawyers from overseas who are interested in understanding more about Hong Kong's status in the PRC.

The first part (worth 5 marks) asked candidates to define relationship between the HKSAR and the PRC under the unitary state system. Most candidates were able to understand and answer it correctly by stating that under the Chinese constitution, China is a unitary state, and by citing relevant articles of the BL such as Arts 1 and 12.

The second part (worth 10 marks) dealt with the vertical division of powers between the HKSAR and the central authorities under the principle of "One Country, Two Systems" and the Basic Law. Again, most were able to identify these powers that belong to the central authorities by referring to the articles in the BL and explaining the circumstances where the central authorities can exercise and have actually exercised these powers. However some other candidates were unable to do this comprehensively.

The third part (also worth 10 marks) aimed at examining candidates' understanding of firstly the *interaction* between the HKSAR and the central authorities, and secondly the *circumstances* in which the central authorities have the power to intervene in the operation of the HKSAR. This proved a more difficult part of the question. While many candidates provided good answers on the *interaction* aspect they often failed to answer the *circumstances* aspect of the question. This requires candidates to have a thorough understanding of the HKSAR government vis a vis the central authorities. Simply reading and comprehending the text of the BL is not enough. That said, a small number of candidates were able to give examples of such *interaction* and provide comments on the appropriateness, or otherwise, of the use of these powers by the central authorities and received more marks as a result.

Question 2

This question was also very popular, being attempted by 66 of the 69 candidates who sat the exam. It had a pass rate of 94%.

The question was divided into two parts. Part 1 (worth 10 marks) asked candidates whether Articles 85 and 88 of the Basic Law are incompatible. This part of the question was generally well answered. Marks were awarded for reasonable analysis which addressed the relationship between the substance of the two Articles. A range of articles were often cited by candidates in their analysis, such as Articles 89, 90, 92 and 104 of the Basic Law. Though many candidates correctly discussed the role of the Judicial Officers Recommendation Commission, some candidates lost marks for failing to do so. There was no expectation that candidates argue in favour of a particular conclusion - either that Articles 85 and 88 are or are not compatible - but most candidates argued that they are compatible.

Part 2 (worth 15 marks) asked candidates whether Article 158 of the Basic Law challenges or qualifies the judicial independence enjoyed by the Hong Kong courts. This part of the question was also generally well answered. Marks were awarded for reasonable analysis which addressed the relationship between judicial independence and Article 158 of the Basic Law. Stronger answers provided a more balanced analysis which identified which parts of Article 158 might challenge or qualify judicial independence and which parts might provide a counterbalance. Some candidates gave good examples of how specific NPCSC interpretations related to the substance of the question. A smaller number of candidates gave a more formulaic answer about NPCSC interpretations which failed to substantially address what was asked by the question. There was no expectation that candidates argue in favour of a particular conclusion - either that Article 158 does or does not challenge or qualify judicial independence - but most candidates argued that Article 158 either does not, or only partly, qualifies judicial independence.

Question 3

This question was relatively less popular, being attempted by 50 of the 69 candidates who sat the exam. It also had the lowest pass rate at 38%.

This question focused on human rights in the context of anti-discrimination legislation, with candidates being asked to advise on rights and remedies in relation to two scenarios involving possible issues of discrimination.

Scripts were in general of a poor standard, with a disappointing number being totally deficient. A majority of candidates failed to spot that the Company was not a public body, but a private law entity. It is, accordingly, by definition not amenable to judicial review. This is a basic point of law, widely accepted in both civil and common law jurisdictions: it is not a recondite quirk of Hong Kong law.

Many candidates did not read the question properly and instead launched into a desultory, pre-written answer, which in many cases involved cobbling together set phrases from their notes. Every effort was made to give the benefit of the doubt. But most answers were marred by a great deal of irrelevance, a failure to engage with the facts, and a complete ignorance of even basic principles of statutory construction.

Better candidates immediately spotted that the Company was not amenable to judicial review and, having overcome that first hurdle, almost invariably passed. Stronger answers showed an ability to engage with the Race Discrimination Ordinance (RDO) and the other legislative materials and formulate clear, well thought-out responses that evidenced an understanding of the lacunae in Hong Kong's current anti-discrimination regime.

A small number of candidates made a serious effort to do book-work during the exam (as one would be expected to do in practice) by looking up the RDO and seeking to apply the relevant provisions. Those who did this book-work correctly spotted that A's claim on the basis of not being a Hong Kong Permanent Resident was hopeless, but she may well have been the victim of discrimination by virtue of her dismissal, which was likely impelled at least in part by racial animus, albeit her line manager imputed to her an ethnicity that was not, in fact, hers. B's case was done less well, and a surprising number of candidates were innocent to the fact that sexual orientation is not a protected category under Hong Kong's anti-discrimination regime. B's complaint about not being able to read Chinese was simply ignored by many candidates.

Most candidates showed an awareness of the role of the Equal Opportunities Commission, and correctly identified this to be a question on anti-discrimination legislation. More work needs to be done, however, to wean weak candidates off pre-packaged responses, and to encourage them to engage in a sensible manner with legislative materials. This message needs to be passed on to service providers preparing candidates for the exam.

Question 4

This question was the least popular, being attempted by only 23 of the 69 candidates who sat the exam. It also had a low pass rate of 48%.

The question was divided into two parts. In the first part (worth 9 marks), candidates were expected to identify possible criminal offences from the three scenarios stated in the question. These involved potential offences relating to restrictions on freedom of expression under both the National Security Law and ss. 9-10 Crimes Ordinance (Cap. 200). Credit was also given to candidates who made sensible suggestions about any possible offences under other laws or ordinances.

Since the National Security Law is explicitly stipulated in the syllabus, candidates are expected to be aware of its provisions. Similarly, since Part 3 of the syllabus includes “Restrictions on Rights and Freedoms”, candidates should also be aware of the restrictions contained in ss. 9-10 Crimes Ordinance. Nonetheless since, unlike the National Security Law, the Crimes Ordinance is not separately mentioned in the syllabus, the text of ss. 9-10 was appended to the question for candidates’ reference.

There were some good answers to the first part of the question. However a disappointingly large number of candidates made no mention of one of the two laws necessary to answer this part of the question, i.e. either the Crimes Ordinance or, more commonly, the National Security Law. In particular, a significant number of candidates simply regurgitated the text of ss. 9-10 Crimes Ordinance that was appended to the question. While examiners may sometimes assist candidates by appending the text of some potentially relevant statutory provisions to a particular question, it is important for candidates to understand that this does not relieve them of the responsibility to consider what other statutory provisions and/or case law may also be relevant and never automatically assume that the question can be answered solely by regurgitating any provisions which have been presented to them together with the question.

The second part (worth 16 marks) required candidates to consider possible defences to those offences which had been identified in the first part of the question. Since candidates were informed that the suspect did not deny participating in any of the potentially unlawful activities outlined in the question, this meant (as was clearly signposted in the question) considering the prospects for successfully challenging the constitutionality of some or all of these offences, and almost all candidates successfully identified this point.

This part of the question was designed to test candidates’ understanding of the difference between the constitutionality of the National Security Law (which the Court of Final Appeal held in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33 can not be challenged in the Hong Kong courts) and the constitutionality of ss. 9-10 of the Crimes Ordinance (which can be challenged in the same way as other ordinances).

Once again there were some excellent answers. However those candidates who had failed to identify either the Crimes Ordinance or, more commonly, the National Security Law as relevant to the first part of the question once again ran into difficulties by continuing to fail to make any mention of one of these two laws in answering the second part of the question.

Question 5

This question was very popular, being attempted by 67 of the 69 candidates who sat the exam. It had a pass rate of 81%.

The question asked candidates to prepare a briefing note explaining the application of Article 158 of the Basic Law.

Part 1 (worth 15 marks) required candidates to explain the meaning and application of the ‘classification’ and ‘necessity’ conditions governing the circumstances in which a judicial reference to the Standing Committee of the National People's Congress is required. Candidates were to justify their response with reference to provisions of the Basic Law and caselaw. At a minimum, candidates should have explained these conditions and the relationship between them, including additional qualifications placed upon these conditions (particularly the ‘predominant provision’ test), drawing upon relevant judicial authority including *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. Given that *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95 is the only such occasion in which a judicial referral has been made, candidates were expected to critique this judgment. This involved an analysis of the Court’s central claim that Articles 13 and 19 were excluded provisions, and that the case could not be resolved without a determination of the questions of interpretation affecting the meaning of these provisions. Candidates generally performed adequately in describing these conditions and citing relevant caselaw, although few excelled.

Part 2 (carrying 10 marks) required candidates to explain the powers of interpretation under the Basic Law respectively of the Court of Final Appeal and the NPCSC. They were to justify their response with reference to provisions of the Basic Law and caselaw. In particular, candidates were to consider evolving judicial perceptions as to the scope of their interpretive power, including ‘excluded provisions’. In particular, the CFA initially argued that it is the body responsible for determining whether or not the provision to be interpreted falls within the competence of the Region or of the CPG: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [91]. However, the substantive effects of this claim are limited, given the CFA’s subsequent acceptance of the NPCSC’s plenary authority to issue Interpretations: *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300. Candidates were to explain the court’s reasoning on the NPCSC’s plenary power of interpretation.

Candidates generally performed adequately in answering this part of the question, although very few excelled. A minority of candidates misunderstood the question, focusing on the limits of judicial review more generally or only on the power of one body instead of both.

OLQE Examiners' Comments 2023

Head VI: Hong Kong Constitutional Law

Question 1

This question was the second most popular, being attempted by 117 of the 124 candidates who sat the exam. However it had the second lowest pass rate, at 70%.

The question asked candidates to draft a memo for their supervising partner's approval to advise the client on issues concerning the relationship between the HKSAR and the Central Authorities, and particularly the powers of the Central Authorities over HKSAR. The purpose of this question was to test to what extent candidates have an overall and balanced understanding of these issues and the legal basis for the powers exercised by the Central Authorities.

In general, candidates demonstrated an acceptable understanding of these issues and provided fairly good answers. However there were also some notable shortcomings.

Part I (carrying 15 marks) asked candidates to identify the circumstances under which the Central Authorities are allowed to intervene in the HKSAR's affairs, with reference to specific provisions in both the Basic Law of the HKSAR and the Law on Safeguarding National Security in the HKSAR. This aimed at testing candidates' understanding of the various state institutions that have authority over the HKSAR as well as their ability to identify and apply relevant provisions in the Basic Law.

However many candidates did not have a clear understanding of the Central Authorities as well as their functions and powers and therefore could not identify the circumstances under which they are allowed to intervene in the HKSAR's affairs. In addition, many failed to cite the relevant articles in the Basic Law.

Part II (carrying 10 marks) dealt with the constitutional basis under which the Central Authorities exercise authority over the HKSAR with reference to specific examples of such events since the establishment of the HKSAR. Candidates were expected to explain the rationale for such interventions and further elaborate by reference to actual examples and events.

The difficulty candidates met was that they could not provide a theoretical explanation for such interventions because of their lack of knowledge of constitutional law under one country two systems and the Basic Law. A good number failed to cite sufficient examples and/or events as required.

In general, candidates are advised to pay attention to recent and current events in Hong Kong which may be relevant in answering such questions.

Question 2

This question was the most popular, being attempted by 124 out of the 128 candidates who sat the exam. It also had the highest pass rate, at 87%.

Parts 1 and 2 were answered well by most candidates who attempted this question.

Part 1 (carrying 15 marks) asked candidates to draft a memo to Bob explaining in detail the differences in the respective powers of the NPCSC and the HKSAR courts to interpret the Basic Law. Many candidates rightly detailed the mechanics of Article 158 of the Basic Law, strengthening their answers by reference to (other) relevant articles of the Basic Law and the PRC Constitution. Authorities such as *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 and *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45 were often well incorporated into answers. One of the more common errors was that candidates failed to discuss the actual mechanisms of Article 158 of the Basic Law which are key to describing and explaining the respective powers of interpretation of the NPCSC and the HKSAR courts. These answers tended to focus on such differences as NPCSC interpretations being more in the character of political, legislative glosses and not being fully reasoned, in contrast to HKSAR court interpretations as reasoned aspects of binding court judgments; while this is important, it does not directly address the question which specifically asked about their respective institutional powers (for example, which articles of the Basic Law can be interpreted by which body and in what circumstances). Nevertheless, most candidates did not commit this error and described well the mechanisms of Article 158.

Part 2 (carrying 10 marks) asked candidates to explain to Bob, with examples, the different mechanisms for obtaining an interpretation from the NPCSC. It was expected that three avenues would be discussed: (i) an own-motion interpretation by the NPCSC, (ii) a request by the Chief Executive and/or HKSAR Government for an NPCSC interpretation, and (iii) a judicial referral by the Court of Final Appeal. A relatively common error was merely to comment on a judicial referral by the Court of Final Appeal - the question did not only ask about judicial referral. Another common error, which was easily avoidable, was a failure to mention examples of each mechanism, for example a failure to mention the *Congo* case when discussing judicial referral. The question clearly asked for examples to be given and candidates who failed to do so threw away some of the easiest marks available in the question. Nevertheless, most candidates did not commit these errors and the question was often well answered.

Question 3

This question was relatively less popular, being attempted by 84 out of the 128 candidates who sat the exam. It also had a relatively low pass rate, at 71%.

This question was about the Sex Discrimination Ordinance and, more tangentially, the Family Status Discrimination Ordinance. It was gratifying to ascertain that most candidates had learnt their lesson from last year's question on anti-discrimination legislation, and correctly identified that Yamato, which is not a public body, was not amenable to judicial review. Once that initial hurdle was overcome, and most candidates correctly spotted the point, the pass rate was adequate. Most candidates correctly identified that AA had likely been subjected to discrimination on account of her sex and/or being pregnant. A fair number of solid candidates also spotted that as there are currently no protections for sexual orientation in Hong Kong's anti-discrimination legislation, that was not an avenue AA could pursue, at least legally. Better scripts subjected Yamato's justifications to critical scrutiny, with most serious attempts concluding (likely correctly) that its proffered explanations for not appointing AA to the Post and for moving her out of her old office were spurious. The very best candidates offered sensible, practical advice by identifying what AA most likely wanted out of any Equal Opportunities Commission/District Court proceedings against Yamato (i.e., appointment to the Post and/or restoration of her old office) and focusing on legal paths that were most appropriate for obtaining those remedies.

Despite the markedly superior quality of scripts relative to last year's answers on anti-discrimination, there remains a persistent problem of 'canned' answers. Several candidates failed because although their scripts contained a wealth of information, not much of it was relevant or properly applied to the facts. It is important for course providers and tutors to emphasise that a problem question requires proper application of the law to the facts, or at least an attempt to do so. Not much credit can be given for *verbatim* copying of notes in a vacuum. An erudite but general summary of anti-discrimination legislation in Hong Kong with no conclusion is like a gymnast who performs a strong technical routine and then fails to dismount. Weaker candidates also evidently did not read the question in sufficient detail, as they omitted vital nuances in the facts. It is vital that candidates take their reading time seriously and consider the question carefully. The facts are not for flavour, but to test the candidate's skills in applying the law to a given fact pattern, which may contain subtle clues that require deeper thought than a superficial first reading.

Another vital practical point that should be made is that some candidates, when writing their answer, did not start on the first page of the answer booklet, but on the second or third and, in some cases, well into the booklet. This is imprudent and confusing, as the examiner would thereby risk missing the answer. Candidates should be advised to start writing on the first page of the answer booklet to signal to the examiner that they have attempted the question.

Most scripts were in terms of handwriting and language skills intelligible; however, some evidenced a knowledge of the English language that is manifestly inadequate for a practising solicitor. Evidently, candidates were not penalised for spelling, grammar, and/or syntax errors as such, but scripts that were drafted in garbled, confused terms suffered.

Question 4

This question was relatively popular, being attempted by 110 of the 128 candidates who sat the exam. It also had the second highest pass rate, at 77%.

The question asked candidates to prepare a briefing note explaining two features of constitutional judicial review, namely the scope and nature of remedies, and the variable standard of review.

Part 1 (carrying 15 marks) was generally well answered by most candidates. Candidates had to identify and evaluate, with examples, remedies available in constitutional judicial review, explaining their scope/triggers of application: (i) declaration of invalidity; (ii) remedial interpretation; (iii) temporary suspension and temporary validity; (iv) damages. Declaration of invalidity is the traditional approach and alluded to in the above quote in *Ng Ka Ling*. Candidates had to engage with this case and explain the legal effect of invalidity. However, candidates should also identify the existence of alternative constitutional remedies and note the considerations and possible triggers for these alternatives. Most candidates did so.

Part 2 (carrying 10 marks) was also, as a general matter, adequately answered. Most candidates identified what the sliding scale of review is, although a minority missed the point of the question and instead addressed issues such as the judicial non-intervention principle exclusively or even addressed a different issue such as the relationship between the CFA and the NPCSC. At a minimum, candidates had to draw upon the CFA's statement in *Fok Chun Wa* and other cases to explain the variable/sliding scale standard of review. In particular, they had to note the later elucidation of this standard in *Hysan* and other cases, where the competing standards of 'reasonable necessity' and 'manifestly without reasonable foundation' had been articulated. Alongside this explanation, the candidates are expected to explain the application of this variable standard of review according to the legislative/executive act under challenge, from acts that implicate 'core values' to those concerned with 'socio-economic policy'. As already noted, most candidates adequately covered these various issues.

Question 5

This question was the least popular, being attempted by 72 of the 128 candidates who sat the exam. It also had the lowest pass rate, at 65%.

Candidates were required to advise two clients who wished to challenge the Immigration Department's rejection of their application for right of abode via judicial review. The question was modelled on the Court of Final Appeal decision in *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26. However it was not necessary to be aware of this case in order to obtain a good mark and, indeed, only a minority of candidates cited this precedent.

The question asked candidates to begin by advising on the general principles that the Hong Kong courts have adopted in interpreting the Hong Kong Basic Law. Candidates in general performed satisfactorily in answering this part of the question, often citing seminal precedents such as *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 and *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 as authority for general principles such as the courts' adoption of a purposive approach toward interpreting the Hong Kong Basic Law by reference to context and purpose, and the courts' constitutional jurisdiction to invalidate any Hong Kong ordinances which are inconsistent with the Hong Kong Basic Law.

However in many cases this constituted the entirety of some candidates (often very brief) answers which made no attempt to continue on to address the fact pattern stated in the question, even though the question specifically required candidates to consider how these general principles might be applied in deciding a judicial review application based on that fact pattern. As a result these candidates did not answer enough of the question to enable them to pass.

Those candidates who did continue on to address the judicial review issue generally did so through a proportionality analysis. Although not the approach adopted by the Court of Final Appeal in either *Prem Singh* or *Fateh Mohammad v Commissioner of Registration* (2001) 4 HKCFAR 278 (which is another highly relevant precedent), this was nonetheless an acceptable approach and many candidates were able to score good marks by an intelligent application of proportionality analysis to the facts stated in the question. However in a significant number of cases, this part of the answer consisted almost entirely of reciting the different parts of the proportionality test with little or no attempt to actually apply them to the facts stated in the question so once making it difficult to secure a pass mark.

While there were some good answers, there does seem a tendency among many candidates to throw everything in the same broad subject area into their answers (ranging from the use of extrinsic materials to interpret the Hong Kong Basic Law to the immigration reservation under the International Covenant on Civil and Political Rights) with little or no consideration of how far these are directly relevant to the specific question they are being asked to answer.

However good candidates did correctly distinguish between the question of the constitutionality (or otherwise) of the S2(4)(b) Immigration Ordinance exclusion of the periods of detention from the definition of ordinary residence for the purposes of

qualifying for right of abode under the Hong Kong Basic Law, and the separate issue of whether Bert and (especially) Albert's periods of detention were so short as to call for the application of a *de minimis* principle even if S2(4)(b) is constitutional.

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3. Past Examination Papers from 2021 to 2023

**2021 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 2 November 2021



2021 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

Raymond works for a corporate law firm in Sydney, Australia. He is seconded to a partner firm in Hong Kong which also specialises in corporate law. In order to expand his understanding of Hong Kong's law and legal system, and the relationship between the Hong Kong Special Administrative Region ("HKSAR") and the People's Republic of China ("PRC") as a whole, Raymond spends some time reading about Hong Kong constitutional law.

During his research, Raymond has noticed that there appear to be inconsistencies and contradictions between two of the major constitutional texts that apply to the HKSAR, namely the "Constitution of the People's Republic of China" ("PRC Constitution") and the "Basic Law of the HKSAR" ("Basic Law"). For example, Article 1 of the PRC Constitution states that the PRC is a "socialist state" and that "the socialist system is the basic system of the People's Republic of China", whereas Article 5 of the Basic Law states that "the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

Raymond has also formed the view that some recent constitutional law developments in the HKSAR seem to be inconsistent with the terms of the Sino-British Joint Declaration. He wonders whether the Sino-British Joint Declaration might be used in litigation to challenge the legality of certain government actions.

(See over the page for a continuation of Question 1)

Questions:

Raymond approaches you for the following advice:

- (1) Are the PRC Constitution and the Basic Law incompatible? How are inconsistencies and contradictions between the PRC Constitution and the Basic Law resolved?**

(10 marks)

- (2) Can the Sino-British Joint Declaration be used in litigation to challenge the legality of government action? Explain your answer.**

(15 marks)

Question 2 (25 marks)

In *Ng Ka Ling & Others v. Director of Immigration*, (1999) 2 HKCFAR 4, 25GI, the Court of Final Appeal (“CFA”) expressed its opinion on the jurisdiction of the courts over legislative and executive branches of the government of the Hong Kong Special Administrative Region (“HKSAR”):

“They [the courts] undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.” (Emphasis added)

In *Cheng Kar Shun v. Li Fung Ying*, [2011] 2 HKLRD 555, 617 the Court of First Instance (“CFI”) also suggested that the courts may need to exercise some caution in exercising jurisdiction over the legislative branch:

“The courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal workings of the Legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the Government.” (Emphasis added)

(See over the page for a continuation of Question 2)

In reaching the above conclusion, the CFI referred to a UK case *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196 at para. 218, and made this comparison:

“The general principles stated by the Privy Council in that case, rather than the facts, are pertinent for our present purposes. Lord Nicholls, delivering the judgment of the Judicial Board, pointed out that the courts’ recognition of Parliament’s exclusive control over the conduct of its own affairs in the United Kingdom is essential to the smooth workings of a democratic society which espouses the separation of powers between a legislative parliament, an executive government and an independent judiciary; the courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators.” (Emphasis added)

Questions:

You are working for a law firm in Hong Kong with a large number of international clients. You are approached by a German client which does business with the HKSAR Government and seeks your advice in order to understand the governmental structure in Hong Kong. Based on the abovementioned CFA and CFI cases as well as other relevant case law, and with reference to specific provisions in the Basic Law:

- (1) Explain the overall governmental structure of the HKSAR with particular reference to how far it constitutes a system of separation of powers and/or a system of executive-led government. (10 marks)**
- (2) Explain the relationship between the legislative, executive and judicial branches of the HKSAR Government, with reference to actual examples from recent events. (15 marks)**

Question 3 (25 marks)

Your supervising partner has asked you to prepare some notes to help in advising a new client, Ms. Mabel Leigh, in a forthcoming meeting. Ms. Leigh has helpfully provided a letter setting out the background. The letter says:

“Dear Solicitors,

I would like your help in resolving an issue between myself and the Smart Kid Tutorial College of Sheung Wan, Hong Kong (“Smart Kid”).

Smart Kid offered me a teaching job in early 2021 while I was completing further studies at Cambridge University in the United Kingdom (“UK”). I accepted immediately as it would give me the opportunity to spend time with my ageing relatives who still live in Hong Kong.

When I arrived in Hong Kong and met the Smart Kid headmistress, she said she was sorry, but that I could not take up the post as English tutor. She told me, indirectly, that the parents of Smart Kid’s pupils were paying top dollar for their children to be tutored by native English speakers and that it would be bad for business to have a Chinese face in the job. I pointed out that I am a native English speaker and had a written contract for the job. The headmistress offered me another post, with the same salary and benefits, as recruitment officer – essentially a sales position. I did not accept the sales position because I have no experience in that field and have no interest in it.

(See over the page for a continuation of Question 3)

Although I am of Chinese ethnic origin, I was born in the UK when my parents were both law students there. I attended boarding school and university in the UK and have lived there my whole life.

Recently I learned that Smart Kid hired a replacement to do the teaching job. The replacement has similar qualifications and experience as me, but she is of pure British stock. The replacement took me out for lunch last week and said that I had been treated unfairly and that I should do something about it.

Please advise me what I can do.

Sincerely,

Mabel Leigh”

Question:

You are asked to prepare brief notes to help your supervising partner prepare for the meeting with Ms. Leigh. Your notes should identify any relevant constitutional and statutory provisions, the remedies which might be available and how Ms. Leigh might be able to go about seeking them.

Your notes may be in point form if you wish.

(25 marks)

Question 4 (25 marks)

You are a solicitor working for a firm specialising in judicial review. You have been asked by your supervisor to deliver a presentation to a visiting delegation from overseas who are unfamiliar with the concept of judicial review as practised in the Hong Kong Special Administrative Region (“HKSAR”).

Questions:

You are asked to prepare speaking notes for your presentation that, incorporating provisions from both the Basic Law and relevant case law, explain the:

(1) Meaning of ‘judicial review’ in the HKSAR and the approach of the Hong Kong courts towards reviewing legislative and executive actions;

(15 marks)

(2) Remedial powers of the courts, including the limits to those remedies.

(10 marks)

Question 5 (25 marks)

You are a newly qualified solicitor. Your supervisor is convening a Continuing Professional Development seminar on various aspects of interpretation of the Basic Law by the National People's Congress Standing Committee ("NPCSC") and the Hong Kong courts.

Questions:

You are asked to prepare a research brief on the following two questions relating to Article 158 of the Basic Law:

- (1) Explain the rationale pertaining to the arrangements for interpretation of the Basic Law that are set out in Article 158 of the Basic Law.**

(10 marks)

- (2) Drawing on the NPCSC interpretive practice under Article 158, identify the salient differences between the various interpretations issued by the NPCSC and their impact on the implementation of relevant provisions in the Basic Law.**

(15 marks)

END OF TEST PAPER

**2022 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 1 November 2022



2022 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

China is a unitary state. The administrative areas in the People's Republic of China (the "PRC") are divided into provinces, autonomous regions and cities directly under central government jurisdiction (Article 30 of the Constitution of the PRC ("PRC Constitution")). In addition, "The state may establish special administrative regions when necessary." (Article 31 of the PRC Constitution) This means that China has four types of subnational constituents situated at the same level.

Article 1 of the Basic Law of the Hong Kong Special Administrative Region (the "HKSAR") states that: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China."

Article 12 of the Basic Law of the HKSAR defines the status of the HKSAR as "a local administrative region" of the PRC as follows: "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government." This Article indicates that the HKSAR shall come directly under the Central People's Government (the "CPG"), while enjoying a high degree of autonomy.

(See over the page for a continuation of Question 1)

In *The Practice of the “One Country, Two Systems” Policy in the HKSAR*, a governmental white paper issued by the CPG in June 2014 (the “2014 White Paper”), the CPG further defined the meaning of the “One Country, Two Systems” policy which relates to the understanding of the status of the HKSAR under the PRC Constitution as follows:

The “one country” means that within the PRC, the HKSAR is an inseparable part and a local administrative region directly under China’s Central People’s Government. As a unitary state, China’s central government has comprehensive jurisdiction over all local administrative regions, including the HKSAR. The high degree of autonomy of HKSAR is not an inherent power, but one that comes solely from the authorization by the central leadership. The high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power. It is the power to run local affairs as authorized by the central leadership. The high degree of autonomy of HKSAR is subject to the level of the central leadership’s authorization. There is no such thing called “residual power.” The most important thing to do in upholding the “one country” principle is to maintain China’s sovereignty, security and development interests, and respect the country’s fundamental system and other systems and principles.

Questions:

You are invited by the managing partner of your law firm to prepare a written speech to be delivered as a presentation to a group of visiting colleagues from overseas who are interested in understanding more about Hong Kong’s status in the PRC, with specific reference to the following three points:

(1) The relationship between the HKSAR and the PRC in a unitary state.

(5 marks)

(See the next page for a continuation of Question 1)

(2) The vertical division of powers between the HKSAR and the central authorities under the principle of “One Country, Two Systems” and the Basic Law. Identify the powers that belong to the central authorities.

(10 marks)

(3) The interaction between the HKSAR and the central authorities, including when the central authorities can intervene in the operation of the HKSAR. Give at least two examples with reasons to justify the appropriateness of the use of these powers by the central authorities.

(10 marks)

Question 2 (25 marks)

Carrie is a retired civil servant who has developed an interest in Hong Kong constitutional law. She has become particularly interested in judicial independence. While reading the Basic Law, Carrie is confused about the relationship between Articles 85 and 88 of the Basic Law.

Article 85 of the Basic Law states:

“The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.”

Article 88 of the Basic Law states:

“Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.”

Carrie asks you for advice on the relationship between Articles 85 and 88 of the Basic Law with regard to judicial independence and the appointment of judges.

Question:

- (1) **Are Articles 85 and 88 of the Basic Law incompatible? Explain your answer.**
(10 marks)

(See the next page for a continuation of Question 2)

Carrie also considers the relationship between judicial independence and Article 158 of the Basic Law, which states in part that the power of interpretation of the Basic Law shall be vested in the Standing Committee of the National People's Congress ("NPCSC"), and that when the NPCSC makes an interpretation of provisions of the Basic Law, the courts of the Region, in applying those provisions, shall follow the interpretation of the NPCSC.

Question:

(2) Does Article 158 of the Basic Law challenge or qualify the judicial independence enjoyed by the Hong Kong courts? Explain your answer.

(15 marks)

Question 3 (25 marks)

In response to the social and economic fallout of the Covid-19 pandemic, Super Lucky Gold Dragon Plc (the “Company”), a multinational enterprise listed on the Hong Kong Stock Exchange, has published a workplace policy (the “Policy”) to support its employees in Hong Kong. The Company employs a multinational workforce in its Hong Kong office, which is also its head office. The terms of the Policy were published only on the Chinese language intranet site (in traditional characters) of the Company and are as follows:

1. The Company will pay a one-off Covid-19 bonus in the amount of HK\$10,000 to each qualifying employee currently employed in Hong Kong, and who has not resigned or otherwise been dismissed.
2. In order to qualify for a payment under the Policy, an employee must further be:
 - a. a Hong Kong Permanent Resident (“HKPR”);
 - b. lawfully married whether in Hong Kong or in any other jurisdiction, and not judicially separated; and
 - c. employed on a full-time basis, and not on work from home arrangements.

(See the next page for a continuation of Question 3)

As a newly qualified associate in the litigation boutique firm, Dobermann & Rottweiler, you are asked by your supervising partner to give pro bono advice in relation to the Policy and you have received the following two e-mails from potential clients:

1. Amber Almeida (“Amber”) is an employee of the Company and a citizen of the Philippines. She has ordinarily resided in Hong Kong for six years, but she is not yet a HKPR. She believes that the Policy is discriminatory against her because it is limited to HKPRs. When she complained to her line manager, who is a US citizen of Filipino origin, she was made redundant. A sympathetic colleague later forwarded Amber a WhatsApp message in which her line manager in a separate discussion had written of her, “Amber has to go – these Indonesians complain too much – they’re not team players!”
2. Bastian Bux (“Bastian”) is a HKPR employee of the Company in a same-sex marriage with his husband, whom he married in Germany, where same-sex marriage is legal. He applied under the Policy, but received a notification in writing from the Company declining his application on the basis that only heterosexual marriages could be regarded as valid marriages for the purposes of enjoying the benefit of the Policy. He wishes to argue that this refusal is unlawful and discriminatory. Bastian also complains that he cannot read the terms and conditions of the Policy in detail, as he has no proficiency in the Chinese language.

Question:

Advise Amber and Bastian on their rights at Hong Kong law and briefly outline any relevant remedies they may seek.

(25 marks)

Question 4 (25 marks)

You are asked to advise a longstanding client whose 19-year-old son, John, has just been questioned under caution by officers from the National Security Department of the Hong Kong Police. You interview John who informs you that he attended the interview voluntarily without the presence of a lawyer assisting him and signed a statement confirming he had participated in the following activities:

- (a) Shouting “Independence for Hong Kong” (i) during a lawful and peaceful public assembly outside the Legislative Council Complex on 1 July 2022 which had received a Notice of No Objection from the Hong Kong Police; and (ii) during an unlawful and sometimes violent public assembly in Victoria Park on 7 July 2022 which went ahead despite objections from the Hong Kong Police;
- (b) Holding a banner stating “Overthrow the Central People’s Government” (i) during a lawful and peaceful public assembly outside the Legislative Council Complex on 1 July 2022 which had received a Notice of No Objection from the Hong Kong Police; and (ii) during an unlawful and sometimes violent public assembly in Victoria Park on 7 July 2022 which went ahead despite objections from the Hong Kong Police;
- (c) Making multiple posts on social media which encouraged readers to express their “hatred, contempt and disaffection” against the Hong Kong Special Administrative Region Government and the administration of justice in Hong Kong.

John informs you that, although he does not deny participating in the above activities, he wishes to plead not guilty to any charges which may be brought against him in relation to these activities and, where possible, challenge the constitutionality of any offences with which he is charged.

(See the next page for a continuation of Question 4)

Questions:

Advise John as to:

(1) any possible criminal offences he may have committed by participating in the above activities;

(9 marks)

(2) any possible defences to these offences, with particular reference to the prospects for successfully challenging the constitutionality of some or all of these offences.

(16 marks)

Extracts of the relevant sections of Crimes Ordinance, Cap. 200 are on pages 10-11.

(See over the page for a continuation of Question 4)

Statutory Provisions Relevant to Question 4

Section 9 of Cap. 200: Seditious intention

- (1) A seditious intention is an intention—
- (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established; or
 - (b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
 - (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
 - (d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
 - (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or
 - (f) to incite persons to violence; or
 - (g) to counsel disobedience to law or to any lawful order.
- (2) An act, speech or publication is not seditious by reason only that it intends—
- (a) to show that Her Majesty has been misled or mistaken in any of Her measures; or
 - (b) to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(See the next page for a continuation of Question 4)

- (c) to persuade Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or
- (d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Hong Kong.

Section 10(1)-(2) of Cap. 200: Offences

- (1) Any person who—
 - (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or
 - (b) utters any seditious words; or
 - (c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or
 - (d) imports any seditious publication, unless he has no reason to believe that it is seditious,

shall be guilty of an offence and shall be liable for a first offence to a fine at level 2 and to imprisonment for 2 years, and for a subsequent offence to imprisonment for 3 years; and any seditious publication shall be forfeited to the Crown.

- (2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and shall be liable for a first offence to a fine at level 1 and to imprisonment for 1 year, and for a subsequent offence to imprisonment for 2 years; and such publication shall be forfeited to the Crown.

Question 5 (25 marks)

Article 158 of the Basic Law provides as follows:

“The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.

The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People’s Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.”

(See the next page for a continuation of Question 5)

Questions:

You are a newly qualified solicitor. Your supervisor is convening a Continuing Professional Development seminar on various aspects of Basic Law interpretation. **She has asked you to prepare a research brief in particular on Article 158 of the Basic Law. Your brief has to address the following two issues:**

(1) Explain the meaning and application of the ‘classification’ and ‘necessity’ conditions governing the circumstances in which a judicial reference to the Standing Committee of the National People’s Congress is required. Justify your response with reference to provisions of the Basic Law and case law.

(15 marks)

(2) Explain the limits of the powers of interpretation under the Basic Law respectively of the Court of Final Appeal and the Standing Committee of the National People’s Congress. Justify your response with reference to provisions of the Basic Law and case law.

(10 marks)

END OF TEST PAPER

**2023 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 31 October 2023



2023 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

Your firm's client is a foreign lawyer who is considering setting up an office in Hong Kong and, as part of his due diligence, is seeking more information on the status of the Hong Kong Special Administrative Region (the "HKSAR") within the People's Republic of China (the "PRC"). His attention has been drawn to the following remarks by Deng Xiaoping which have been cited in explaining the role of the Central Authorities under one country, two systems:

'Don't think that all of Hong Kong's affairs will be managed by Hong Kong with the central government sitting by idly, and everything will be just fine. This is not acceptable. This type of attitude is not practical. The central government indeed will not meddle in the SAR's specific affairs; it will not need to meddle. However, what if something occurs within the SAR, which threatens the nation's basic interests? Can you say that such a situation could not arise? At that time, shouldn't Beijing concern itself with the matter? Can you say that no events will arise in Hong Kong, which may be harmful to Hong Kong's own basic interests? Can you imagine that there will be no obstructions or destructive forces in Hong Kong? I see no grounds for such self-consolation. If the central government abdicates all power over Hong Kong, then chaos may ensue, damaging Hong Kong's interests. Therefore, preserving certain powers for the central government is beneficial, not harmful, to Hong Kong. For instance, after 1997 if someone in Hong Kong condemns the Communist Party and condemns China, we will still allow him to speak; but if the words become actions and he wants to turn Hong Kong into a 'democracy' and set up a base to oppose the mainland, what then? If we cannot intervene at that time, it would not be acceptable. Intervention would first

(See over the page for a continuation of Question 1)

be by Hong Kong administrative organs; it is not at all certain that mainland troops stationed in Hong Kong would take any action. If there is disturbance or great turmoil, only then will the forces stationed in Hong Kong act; but in such circumstances they must always be able to intervene!'

(Deng Xiaoping, "Speech at a Meeting with the Members of the Committee for Drafting the Basic Law of the HKSAR", April 1987.)

Questions:

Draft a memo for your supervising partner's approval to advise the client on the following issues:

(1) The circumstances under which the Central Authorities are allowed to intervene in the HKSAR's affairs, with reference to specific provisions in both the Basic Law of the HKSAR and the Law on Safeguarding National Security in the HKSAR.

(15 marks)

(2) The constitutional basis under which the Central Authorities exercise authority over the HKSAR, with reference to specific examples of events since the establishment of the HKSAR.

(10 marks)

Question 2 (25 marks)

You are a newly qualified solicitor in Hong Kong who is seconded to the legal department of the Shanghai headquarters of Zhang Global Aerospace Operations (“Zhang”), a multinational company specialising in the leasing and operation of commercial aircraft. Zhang has been attempting to launch a new airline based in Hong Kong and has been unsuccessful in obtaining the necessary air transport licences from the Department of Aviation of the Hong Kong Special Administrative Region (the “Department”) to operate a new airline. Your supervisor in Zhang’s legal department, Bob, suspects that the Department has misinterpreted the statutory requirements for the issuance of new air transport licences and sends you an email, part of which is extracted below:

‘The Department of Aviation has clearly got this wrong. I found Article 128 of the Basic Law which states that “The Government of the Hong Kong Special Administrative Region shall provide conditions and take measures for the maintenance of the status of Hong Kong as a centre of international and regional aviation.” We are launching a new airline in Hong Kong which will be very competitive and the Department’s decision to refuse our air transport licences must be unconstitutional under Article 128 of the Basic Law.

The Department’s attitude has been terrible. I think they just don’t want us to enter the Hong Kong market and that’s the end of it. We should take them to the courts in Hong Kong and appeal all the way. Drag them through the whole system. How do we escalate this case to the attention of the Standing Committee of the National People’s Congress? Surely they would put the Department back in its place and apply the law correctly.’

(See over the page for a continuation of Question 2)

Questions:

(1) Draft a memo to Bob explaining in detail the differences between the respective powers of the Standing Committee of the National People's Congress (the "NPCSC") and the courts of the Hong Kong Special Administrative Region to interpret the Basic Law.

(15 marks)

(2) Explain to Bob, with examples, the different mechanisms for obtaining an interpretation of the Basic Law from the NPCSC.

(10 marks)

(Note: Specific knowledge of Article 128 of the Basic Law is neither expected nor required in answer to either question (1) or question (2).)

Question 3 (25 marks)

Yamato Corporation (“Yamato”) is a company incorporated in Japan with a dual listing on the Tokyo and Hong Kong Stock Exchanges. It carries on its business in Hong Kong through a local branch (the “Branch Office”). As part of a broader development in its Greater China business, Yamato decided to set up a new regional strategic planning unit in the Branch Office. It then went about interviewing a number of current employees of the Branch Office with a view to identifying a suitable candidate to head that new business division (the “Post”).

One of the candidates, Audrey Au (“Audrey”), had an outstanding record in employment and had recently married. During her internal interview, Audrey was asked whether she intended to have children. Audrey replied that she was pregnant and hoped to have a large family. Shortly thereafter, she was notified that she had not been selected for the Post, and that this had been assigned to a man, Balthazar Bai (“Balthazar”), who was (and remains) unmarried and whose performance record in employment was not as strong as Audrey’s. When Audrey’s line manager notified her of his decision not to appoint her to the Post, he emphasised that Yamato was grateful for all her hard work, but that the Post would involve long hours and a high degree of mental stress, and that it would perhaps be best for her to spend more time with her family. He also spoke in a disapproving tone about the fact that Audrey had married another woman. Finally, he emphasised that the Post would require travel to areas in the East Asia region with very challenging working conditions, including a high risk of tropical disease.

(See over the page for a continuation of Question 3)

Shortly after being notified that she had not been given the Post, Audrey went on maternity leave. When she returned from maternity leave, she found that the spacious corner office with a sea view that had previously been hers had been permanently re-assigned to Balthazar and that she had instead been allocated an interior, window-less office on another floor. When Audrey inquired as to why her office had been changed, she was informed by her line manager that as she had written him an e-mail stating that she intended to breastfeed in the office, this would be ‘upsetting’ to other employees and accordingly she had to be moved to a more ‘discreet’ location.

Audrey was dissatisfied both with being turned down from the Post and losing her old office. She accordingly decided to instruct a firm of solicitors to ascertain whether she has any remedies available to her to address those two complaints.

You are a newly qualified associate at the boutique litigation firm, Dobermann & Rottweiler and have been asked by your principal to prepare a memorandum of advice on Audrey’s legal position.

Question:

Draft, for your supervising partner’s approval, a memorandum of advice in the matter of Audrey being denied the Post and being moved to a different office, and outlining any remedies that may be available to her. You should support your analysis by referring to any applicable statutory provisions and/or case law on point.

(25 marks)

Question 4 (25 marks)

In *Ng Ka Ling & Others v. Director of Immigration*, (1999) 2 HKCFAR 4, 25GI, the Court of Final Appeal (“CFA”) defined the jurisdiction of the courts over legislative and executive branches of the government of the Hong Kong Special Administrative Region (“HKSAR”) in the following terms:

“They [the courts] undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.”

In *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, the CFA articulated a variable standard of review:

“The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche. After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty-bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values. This requires a little elaboration. Where, for example, the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect

(See over the page for a continuation of Question 4)

and dignity that society accords to a human being. They are fundamental societal values. On the other hand, where other characteristics or status which do not relate to such notions or values are involved, and here I would include residence status, the courts will hesitate much more before interfering; in other words, more leeway is given to the executive, legislature or other authorities.”

Questions:

You are a newly qualified solicitor in a law firm in Hong Kong which is organising in-house training on the practice of constitutional judicial review. You have been asked to prepare a briefing for those who will attend on this topic. **Based on the abovementioned CFA cases as well as other relevant case law, and with reference to specific provisions in the Basic Law:**

- (1) Explain the remedies which may be granted by the court in the event that legislation is found to be inconsistent with the Basic Law, with reference to examples for each type of remedy.**

(15 marks)

- (2) Explain the variable standard of review with reference to examples, and the extent to which it may affect a client’s ability to obtain a remedy by way of constitutional judicial review.**

(10 marks)

Question 5 (25 marks)

Albert and Bert are foreign nationals who have been living and working in Hong Kong continuously since June 2016. Both own properties in Happy Valley, Hong Kong. In June 2022, Albert and Bert were arrested and charged with assault following a drunken brawl in a nightclub. Albert and Bert were initially denied bail during their first court appearance, after they drunkenly shouted at the magistrate in the courtroom. However, after being detained overnight, Albert and Bert both apologised when the court hearing resumed the next morning and were released on bail. Albert was subsequently found not guilty of all charges while Bert was convicted of assault and served a two-week prison sentence in December 2022.

In July 2023, Albert and Bert applied to the Immigration Department for right of abode in Hong Kong by reference to Article 24(2)(4) of the Hong Kong Basic Law which states that the permanent residents of the Hong Kong Special Administrative Region shall include:

“Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;”

However, the Immigration Department rejected Albert and Bert’s applications for right of abode in Hong Kong by reference to Section 2(4)(b) of the Immigration Ordinance (Cap. 115) which states that a person shall not be treated as ordinarily resident in Hong Kong:

“during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court.”

(See over the page for a continuation of Question 5)

Albert and Bert wish to challenge the Immigration Department's rejection of their application for right of abode via judicial review and approach you for advice.

Question:

By reference to relevant case law(s), advise Albert and Bert on their likely prospects of success, by reference to both the general principles that the Hong Kong courts have adopted in interpreting the Hong Kong Basic Law, and also by reference to how these principles may apply in deciding their proposed judicial review application.

(Note: You are neither expected nor required to advise on the procedural steps required to lodge such an application for judicial review.)

(25 marks)

END OF TEST PAPER