

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Friday, 1 November 2019



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Question 1 (25 marks)

In the recent protests against the government's proposed amendments to Hong Kong's extradition laws on 1 July 2019, some protesters shouted slogans advocating Hong Kong independence, and waved what they described as the flag of an independent Hong Kong.

Henry is a foreign businessman who is visiting Hong Kong. He observed the protests and was surprised to see the flag of an independent Hong Kong. As a newcomer to Hong Kong, he knows very little about the background to "one country, two systems", and is confused about the difference between a high degree of autonomy and independence.

Question:

Before deciding whether to invest in Hong Kong, Henry seeks your advice asking you to provide him with a legal opinion explaining the background to the establishment of the Hong Kong Special Administrative Region ("HKSAR"), its status under the Hong Kong Basic Law with reference to specific provisions in this document, the differences between a high degree of autonomy and independence, and whether there is any realistic prospect of Hong Kong becoming a separate country.

Advise Henry.

(25 marks)

Question 2 (25 marks)

The Chief Executive of the HKSAR has been a staunch supporter of a Legislative Council bill (the "Bill") that would prohibit the sharing of information about protests in Hong Kong with persons located in Mainland China. This includes the sharing of information by electronic means, for example by e-mail, text or on social media. The HKSAR Government cited "national security" concerns in relation to the objectives of the Bill in a Legislative Council briefing paper, and it is widely suspected that the Bill is aimed to prevent similar protests arising in Mainland China.

The Bill has been condemned by members of the legal and political communities in Hong Kong as an assault on freedom of speech. It has also resulted in a number of protests across the territory, some of which have resulted in damage to public property. Nevertheless, the Chief Executive has made an unusually large number of public and media appearances speaking in support of the Bill, both prior to its formal introduction and during the legislative process. This has led to widespread concern about the Chief Executive's role in, and influence on, the legislative process.

Your client, Philip, is a local student. He intends to apply for judicial review seeking, among other things, an order that the Bill, if enacted as an Ordinance, be declared unconstitutional. In preparation for the case, Philip asks you to explain to him what is meant by "executive-led" government, with particular reference to how laws are made.

Question:

- (1) Explain to Philip the concept of "executive-led" government, with particular reference to the legislative process.**

(10 marks)

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

Philip also wants to argue in his application for judicial review that the judge cannot be regarded as independent in line with the requirements of the Basic Law, as the Chief Executive appoints judges in the HKSAR under Article 48(6) of the Basic Law, and the Chief Executive is also expected to be cited as a respondent in the application for judicial review for her role in supporting the Bill.

Question:

- (2) Advise Philip as to whether you expect his argument that the judge cannot be regarded as independent to be successful or unsuccessful in court. Explain your answer.**

(15 marks)

Question 3 (25 marks)

You are a newly admitted solicitor in Hong Kong. A file concerning freedom of expression has been passed to you to prepare a research note.

The client is a junior police officer who has been charged with an offence under section 34 of the Police Force Ordinance (Cap. 232). That section provides:

"Any police officer who threatens or insults another officer of senior or equal rank when such other officer is on duty or when such threat or insult relates to or is consequent on the discharge of duty by the officer so threatened or insulted, shall be liable on summary conviction to a fine of \$500 or to imprisonment for 1 year."

Following a demonstration by several hundred thousand people earlier this year on the streets of Hong Kong, which resulted in violence, there was a closed-door de-briefing session attended by around 1,000 police officers, including the client. Some of the front-line officers who had been at the scene were upset that they had been ordered to use what they considered to be excessive force. Others took the opposite view, that senior officers had been too lenient, preventing front-line officers from using sufficient force to maintain public order. The client took part in a heated exchange with other officers at the closed-door de-briefing session. At one point he shouted foul language at his senior officers and referred to them as animals.

All of the facts alleged against the client are admitted, and it is further admitted that those facts would be sufficient to found a conviction, subject only to the question of the client's constitutionally protected right to freedom of expression.

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

Although the penalty on conviction might be fairly lenient, the case is of great importance to the client, because after conviction he might face police disciplinary proceedings which could result in loss of his job, quarters and pension.

Question:

Prepare a research note on constitutional protection of freedom of expression and advise whether it might afford the client a legal defence at trial. The note is for your supervising partner to assist at a forthcoming meeting with the client to consider how to proceed. You should refer to relevant constitutional provisions and cite relevant case authority(ies).

(25 marks)

Question 4 (25 marks)

Your law firm is looking to establish a public interest *pro bono* practice to represent the interests of 'minorities' and/or 'vulnerable groups' in the Hong Kong community through the strategic use of constitutional litigation.

Questions:

You have been asked to write a briefing note for your supervisor on some of the features of judicial review in Hong Kong and how this relates to the aforementioned groups. This note must refer to specific provisions of the Basic Law and relevant jurisprudence. It must address the following three issues:

(1) Whether the range of rights in the Basic Law provide 'adequate' protection for the interests of minorities and/or vulnerable groups in the Hong Kong community.

(10 marks)

(2) The record of the courts in affording constitutional protection to the interests of minorities and/or vulnerable groups in the Hong Kong community. Consider also whether the 'margin of appreciation' doctrine has affected the extent to which the courts have given such groups constitutional protection. Substantiate your answer to this sub-question with at least two examples where the constitutionality of legislation has been challenged.

(10 marks)

(3) The extent to which the remedies available in constitutional judicial review are able to advance the interests of 'minorities' and/or 'vulnerable groups' in the Hong Kong community.

(5 marks)

Question 5 (25 marks)

Consider this hypothetical scenario.

The Transfer of Fugitive Offenders Ordinance ("Ordinance") came into effect in 2019. It would allow extradition of criminal suspects from the HKSAR to the People's Republic of China ("PRC"). The Ordinance was silent on whether an extradition could be refused based upon the principle espoused in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 ("*Ubamaka*"), which prevents the removal of an individual from the HKSAR to a destination where there was a sufficiently established threat that their non-derogable and absolute human rights would be violated by the receiving authority.

Questions:

You are asked to prepare a research briefing dealing with the scope of the National People's Congress Standing Committee's ("NPCSC") power to interpret the Basic Law in a manner that disapplies the application of the *Ubamaka* principle to extraditions from the HKSAR to the PRC. Your briefing must cite relevant provisions of the Basic Law and jurisprudence. It must address the following issues:

- (1) Is this a matter that the Court of Final Appeal ("CFA") would have to seek from the NPCSC an Interpretation of the Basic Law?**

(10 marks)

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

- (2) Assuming that the NPCSC decides to issue an Interpretation of the Basic Law of its own motion which excludes the applicability of the *Ubamaka* principle to extradition cases, to what extent could the CFA review the validity of this Interpretation, or otherwise read down its effects?

(15 marks)

END OF TEST PAPER