

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2020 SUPPLEMENTARY INFORMATION PACKAGE

HEAD VI: HONG KONG CONSTITUTIONAL LAW

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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;
- 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

- Kemal Bokhary, Michael Ramsden & Stuart Hargreaves, *Hong Kong Basic Law Handbook* (Sweet & Maxwell, 2015);
- Johannes Chan & C.L. Lim, *Law of the Hong Kong Constitution* (Sweet & Maxwell Asia, 2nd edition, 2015);
- Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (HKU Press, 2nd edition, 1999);
- Danny Gittings, *Introduction to the Hong Kong Basic Law* (HKU Press, 2nd edition, 2016);
- P.Y. Lo, *The Hong Kong Basic Law* (LexisNexis, 2011);
- P.Y. Lo, *The Judicial Construction of Hong Kong's Basic Law* (HKU Press, 2014);
- Stephen Thomson, *Administrative Law in Hong Kong* (Cambridge University Press, 2018);
- Wang Shuwen, *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (Law Press, 2nd English edition, 2009);
- 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 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;
- 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 2017, 2018 and 2019 Examinations

OLQE Examiners' Comments 2017

Head VI: Hong Kong Constitutional Law

Question 1:

In the first part of the question (which was worth 10 marks), most candidates successfully identified that it is not possible to appeal a case from the Court of Final Appeal to the NPCSC. The majority of candidates who identified this did so by reference to the Basic Law. However, several candidates failed to refer to the Sino-British Joint Declaration in their answers as required by the question. A relatively small number of candidates appeared either to regard this part of the question as more difficult than it in fact was, or were unclear on the basic relationship between the Court of Final Appeal and the NPCSC, in asserting that it was not clear whether Brian could appeal the case to the NPCSC. Fortunately, the majority of candidates did not misunderstand that relationship.

A range of answers was offered to the second part of the question (which was worth 15 marks). Many of these answers showed good understanding of the issues and candidates were appropriately rewarded where the law was correctly understood and feasible arguments/counter-arguments offered in either direction. Article 158 of the Basic Law was clearly relevant. Some candidates regarded the resolution of Brian's rights of freedom of speech, assembly and demonstration – in the context in which they arose – as raising issues concerning the relationship between the Central Authorities and the HKSAR, therefore requiring an interpretation from the NPCSC. Other candidates regarded the determination of those rights as within the autonomy of the HKSAR and therefore not requiring an interpretation from the NPCSC. Whilst the latter was probably the more intuitive argument, candidates who used the former argument were also appropriately rewarded where their answer was cogent and feasible.

Question 2:

This question was divided into two parts. The first part of the question (which was worth 10 marks) required candidates to discuss the correct forum for raising a defence to the facts stated in the question, and demonstrate an awareness that human rights and other constitutional points can be raised in any court or tribunal in Hong Kong in any proceedings in which they arise.

The second part of the question (which was worth 15 marks) required candidates to demonstrate a basic understanding of, among other matters, the fact that the Bill of Rights and International Covenant on Civil and Political Rights generally take precedence over legislation and the manner in which administrative powers are exercised.

The standard of the candidates answering this question came as a pleasant surprise. The great majority of them clearly understood the approach which the courts take on such issues. That enabled the bulk of them to advise the client on the pros and

cons of the constitutional issue raised in the question. As a result there were few failing marks on this question, and a good number of higher marks.

Question 3

This question tested candidates' understanding of the provisions on political structure in Chapter IV of the Hong Kong Basic Law, with particular reference to how far these provide for a system of separation of powers. Candidates were expected to cite relevant case law and discuss how far the "non-intervention principle" was applicable to the facts stated in the question. These facts were modelled on actual events in 2010 when the administration accused the Legislative Council of acting ultra vires in repealing an order relating to the Tseung Kwan O landfill, although candidates were not required to demonstrate any knowledge of these events in answering the question.

Answers to Part 1 were generally satisfactory, with most candidates demonstrating a reasonable understanding of the relevant provisions in Chapter IV of the Hong Kong Basic Law, although some answers displayed a tendency to recite them without providing any substantive analysis. Answers to Part 2 were more mixed. There were some excellent answers, and most candidates were able to make at least some reference to the "non-intervention principle". The majority of candidates also correctly cited the leading case of *Leung Kwok Hung v President of the Legislative Council (No 1)* (2014) 17 HKCFAR 689. However all too often no reference was made to other important cases in this area (such as *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555) and many candidates lost marks as a result.

Question 4

This question was divided into 3 parts. Part 1 (which carried 5 marks) tested candidates' knowledge about the different approaches to interpretation of the Hong Kong Basic Law adopted by the National People's Congress Standing Committee and the Court of Final Appeal. This part of the question was generally well answered, although some answers were rather too brief and made insufficient reference to relevant case law [e.g. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211].

Part 2 (which carried 10 marks) tested candidates' understanding of the position of the Court of Final Appeal in relation to the binding effect of Standing Committee interpretations. Once again, it was essential to cite relevant case law such as *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 and *Chong Fung Yuen*. Answers to Part 2 were more variable. While there were some good answers, other answers missed the main point of this part of the question and sometimes wrote about issues which were barely relevant (e.g. a long description of the principles of proportionality).

Part 3 (which also carried 10 marks) tested candidates' understanding of the reviewability of Standing Committee Decisions, with particular reference to the 31st August 2014 Decision on universal suffrage. It was important to cite the *obiter* in *Ng Ka Ling* and the majority of candidates were able to do so. However, once again, some entirely missed the main point of this part of the question, and a small number

appeared confused about the distinction between Decisions and Interpretations of the Standing Committee.

Question 5

This question was also divided into three parts. Part 1 (which carried 5 marks) required candidates to consider whether the non-resident in the question is able to initiate judicial review and was generally well answered.

Part 2 (which carried 10 marks) focused on the issue of margin of appreciation. Answers to this part were more mixed with stronger candidates referring to cases such as *W v Registrar of Marriage* (2013) 16 HKCFAR 112; *W v Registrar of Marriage* [2010] HKEC 1518 and the “core values” analysis of the Chief Justice in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409. However a significant minority of candidate missed the point of this part of the question altogether.

Part 3 (which also carried 10 marks) required candidate to identify rights that might be restricted by the facts stated in the question and apply the steps outlined in *Hysan DevelopmentCo Ltd and Others v Town Planning Board* (FACV 21/2015), to determine whether any such restrictions would be likely to be upheld. This was generally well answered although, perhaps indicating poor time management, there were many cases where answers were too brief and did not go into sufficient detail.

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OLQE Examiners' Comments 2018

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by all 144 candidates who sat the exam. It also had the highest pass rate of any question, at 89%.

The question was divided into three parts and required candidates to write a briefing note for a group of overseas clients who are about to pay their first visit to Hong Kong and seek your advice on Hong Kong's status with the People's Republic of China.

Answers were generally adequate and most achieved a pass mark. However there were very few really good answers. The main problem was that many candidates had a rather rough and superficial understanding of the issues involved and were unable to answer the three parts of the question in a targeted way.

In relation to part 1 of the question on the nature of the structure of the Chinese state (which carried 5 marks), an alarmingly large number of candidates failed to mention that China is a unitary state. In relation to part 2 of the question (which carried 12 marks), many were not well aware of the division of powers between the central authorities and the HKSAR under One Country Two Systems, and resorted to guesswork. In relation to part 3 of the question which required two specific examples of the exercise of powers by the central authorities to intervene in the running of the HKSAR (which carried 8 marks), many failed to read the question properly and cited only one such example (usually interpretation of the Hong Kong Basic Law).

In future, candidates would be advised to better prepare for questions in this area and to read such questions more carefully.

Question 2:

This question was the second most popular, being attempted by 130 candidates. However it had the lowest pass rate, at 48.5%.

The question was generally modelled on the Legislative Council oath-taking controversy and the cases of *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 144 and *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 417.

In relation to part (1) of the question (which carried 15 marks), a considerable number of candidates gave general commentary on the power of the NPCSC to issue interpretations. Some included in that commentary observations on how that power may or may not represent a threat to the separation of powers and the rule of law in general. Relatively few candidates answered the part of the question referring to the issuing of such an interpretation "before judgment is given in the second set of judicial review proceedings", which raised the important issue of the timing of

NPCSC interpretations, and the potential impact of their timing on the separation of powers and the rule of law. Some candidates identified parallels with the Legislative Council oath-taking controversy, though many candidates did not which was surprising given its constitutional significance.

In relation to part (2) of the question (which carried 10 marks), this part generally appeared to be better answered, though many candidates did not fully answer the question resulting in loss of marks. Some candidates gave a balanced answer, though did not offer sufficient detail, analysis or context which could attract the full range of marks on offer. The case of *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 417 was again relevant, though few candidates recognised this.

Question 3

This question was relatively popular, being attempted by 120 candidates. It also had a relatively high pass rate of 73%.

This was a very practical question concerning the right to trial without delay in the context of a criminal case. The facts posited a client who had been in custody for 4 years waiting trial, judicial review, appeal and ultimately retrial. Many (if not most) candidates took a rather academic approach. That would perhaps be fully excusable with fresh law graduates, but was a negative factor in applying the standard of a day 1 solicitor.

Question 3(1):

Candidates were asked whether the client's rights had been infringed. The relevant provisions of the ICCPR and HKBOR concerning delay were set out in the question. Some candidates were astute enough to mention art 87(2) of the Basic Law (not mentioned in the question), which contains a similar provision. Many candidates discussed other rights such as the right to a fair trial (relevant, but unnecessary when a specific delay right exists) and the right to be provided with an interpreter (an issue which on the facts had already been dealt with). Some even did so to the exclusion of discussion the delay right. Perhaps they were relying on pre-prepared answers. Fortunately, most were aware of the distinction between derogable and non-derogable rights, and the need for a proportionality analysis in the case of prima facie breach of the former. It was very disappointing that many candidates (perhaps the majority) found it necessary to consider whether client's status as a foreign domestic helper would somehow deprive her of the usual rights in the criminal process.

Question 3(2):

Here candidates were asked to advise client which remedy or remedies to seek. It was disappointing that many failed to mention any remedy which could have resulted in release of client, whether that be bail, stay of proceedings or judicial review with a view to quash the decision to continue with the prosecution. Far too many candidates would have sought a declaration by way of judicial review and/or damages, while client (apparently) languished in custody. True enough, this is a paper on

constitutional law not criminal procedure, but the day 1 solicitor needs to know how constitutional points arise in all manner of cases clients may face.

Question 3(3):

Candidates were asked in which forum the remedy should be sought. Most candidates correctly answered that constitutional rights may be ventilated in any court or tribunal in proceedings in which they arise, citing the relevant provision of the HK Bill of Rights. However, too many of them went on to contradict themselves by suggesting that somehow the CFI would be the only appropriate forum in this case, ignoring the fact that the District judge dealing with client's case has full power to consider the delay point and grant an appropriate remedy. Similar wording was used by most of those candidates, citing the same authority (Latker). This suggests they were copying from pre-prepared answers.

Many candidates did not apply knowledge that they surely must have of the court structure and jurisdiction. Common mistakes were (i) suggesting that an originating application for judicial review be made direct to the Court of Appeal or the Court of Final Appeal; (ii) suggesting judicial review of the Court of Appeal's decision to order a retrial; and (iii) suggesting an appeal, or judicial review, of denial of bail, rather than making a fresh application based on change of circumstances.

Question 4

This question was the second least popular, being attempted by only 96 candidates. However it had the second highest pass rate, at 76%.

In the first part of the question (which was worth 20 marks), most candidates successfully identified the engagement of constitutional rights under the Basic Law. Most candidates also identified the application of the proportionality test although in some cases there was a distinct lack of application of this test to the facts at issue. That said, the general standard was satisfactory; a handful of answers were excellent.

Candidates also fared generally quite well on the second part of the question (worth 5 marks) concerning the amenability of prosecutorial decisions to judicial review. While a minority of candidates missed the point of the question, or applied seemingly irrelevant precedent, the general response was satisfactory.

There were also a number of candidates who did not attempt an answer to this question at all, or were only able to attempt an answer to 4(1) but not 4(2). This perhaps indicates poor time management generally, or a need for candidates in the future to prepare, to a greater extent, from that part of the syllabus concerning fundamental human rights and judicial review under the Basic Law.

Question 5

This question was the least popular, most likely because candidates were not expecting a question in this area, and was attempted by only 84 candidates. It also had the second highest pass rate at 55%.

The question was divided into two parts. Part 1 was worth 15 marks and required candidates to address two separate issues. The first was to advise on relevant provisions in the Hong Kong Basic Law concerning Hong Kong's future after 30 June 2047, with particular references to any provisions relevant to the continuation of government land leases beyond that date (with a maximum of 10 marks being awarded for answers on this issue). Although Article 5 and 123 are particularly relevant here, answers which put forward reasoned arguments in relation to other provisions in the Hong Kong Basic Law were also given good marks. One problem which arose in a number of answers was to (mis)interpret the question as simply requiring candidates to copy out the text of such provisions without providing any analysis or explanation of their content. Since a real legal advice would not consist of simply copying out a list of statutory provisions, candidates who adopted this approach were penalized.

The second issue in Part 1 concerned whether it would be possible to initiate an amendment to the Hong Kong Basic Law under the circumstances stated in the question (with a maximum of 5 marks being awarded for answers on this issue). Good answers required an understanding of which parties have the power to initiate such an amendment under Article 159(2) of the Hong Kong Basic Law, and this was lacking in some answers.

Part 2 of the question was worth 10 marks and required candidates to identify a procedural defect in an amendment to the Hong Kong Basic Law and advise on whether this issue would be subject to the jurisdiction of the Hong Kong courts. This was generally well answered, with most candidates spotting the failure to consult the Committee for the Basic Law (as required under Article 159(3) of the Hong Kong Basic Law) prior to the adoption of the amendment. Wide leeway was given to candidates in addressing the issue of whether or not this issue would be subject to the jurisdiction of the Hong Kong courts. However, candidates were expected to cite relevant case law, which was lacking in some answers.

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OLQE Examiners' Statement 2019

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by 150 out of the 154 candidates who sat the exam. It had the second highest pass rate of any question, at 89%.

The question required candidates to write a legal opinion for a foreign business client explaining the background to the establishment of the Hong Kong Special Administrative Region, 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.

Answers were generally adequate and most achieved a pass mark. The main problem was that some candidates did not directly address the points specifically raised in the question and instead wrote general answers, or simply repeated various provisions in the Hong Kong Basic Law without making any significant effort to provide the analysis that would be expected in a legal opinion for a client. In some cases, this led to candidates failing to achieve a pass mark.

Question 2:

This question was relatively less popular, being attempted by 121 of the 154 candidates who sat the exam. It had a pass rate of 77%.

This question was divided into two parts, with part (1) being generally less well answered than part (2). Although part (2) carried 15 marks, while part (1) carried only 10 marks, it was surprising to see a significant number of candidates evidently spending more time on part (1) than on part (2), and/or giving insufficient detail or analysis in part (2). Candidates should pay more attention to the division of marks in a question as an indicator of how they might most profitably divide their labour.

Part (1) required candidates to demonstrate an understanding of Basic Law provisions that served as evidence of an executive-led system (or otherwise), but it required more than a mere listing of those provisions without elaboration. A number of candidates adopted this unelaborated approach which would, in itself, be insufficient to obtain a pass mark on this part. Insufficient elaboration and/or analysis was the principal defect in answers to part (1).

Part (2) was generally better answered, with most candidates who attempted this part grasping the key issues and reasoning to a logical conclusion, though again this would have benefited from improved detail and analysis.

Question 3

This question was moderately popular, being attempted by 130 out of the 154 candidates. It had the highest pass rate, at 95%.

Candidates were required to write a research note on constitutional protection of freedom of expression with reference to a specific case described in the question. The overall performance of candidates was very good, as reflected in the 95% pass rate for this question. Nonetheless there were a number of serious errors in some answers. In particular, this year as in the previous year, there were candidates who took the view that constitutional rights depend on immigration status. Some referred to the "immigration reservation" (in the HK Bill of Rights Ordinance). These candidates thought that the client's right to freedom of expression depended on whether he was a Hong Kong permanent resident. Last year they thought that the right of a person charged with a criminal offence to trial without undue delay depended on whether the person was a permanent resident. Candidates may have been taught this by one of the course providers, but this is no excuse. The idea that only permanent residents are entitled to fundamental rights is so abhorrent that any sensible candidate should stand up in shock and say "that can't be right". Furthermore, candidates should be familiar with the whole of the Basic Law. Article 41 of the Basic Law puts the matter beyond doubt, stating that any person in the HKSAR enjoys the protected rights. The "immigration reservation" (s 11 of the HK Bill of Rights Ordinance), if candidates took the time to read it, by its own terms applies only to the entry, stay and departure from Hong Kong of persons not having the right to enter and remain.

The other recurrent error, this year and last, relates to judicial review. Many candidates do not seem to be aware that judicial review is a specific procedure whereby (as you know) the Court of First Instance exercises supervisory jurisdiction over inferior courts, tribunals, the executive branch of government and other decision makers. These candidates seem to think that when any court considers a constitutional point it is conducting "judicial review". Some even suggested applying to the Court of Appeal or Court of Final Appeal for judicial review. They appear to be using "judicial review" in a very loose sense such as review by a judge of a constitutional point. However a lenient view was taken of this error as Head VI is not a procedure paper.

Better candidates did demonstrate an understanding that constitutional points may be raised in any court proceedings in Hong Kong without the need for a separate application for judicial review.

Question 4

This question was the least popular, being attempted by only 72 out of the 154 candidates. It also had the second lowest pass rate, at 72%.

The question was divided into three parts and invited candidates to consider the extent to which the Basic Law protects 'minorities' and/or 'vulnerable' groups. This question gave a great deal of license to candidates to define these terms and develop their answer from the body of available constitutional jurisprudence.

Part 1 (which carried 10 marks) required candidates to consider the range of constitutional rights in the Basic Law and BORO, and specifically whether they are 'adequate' in protecting the interests of minorities/the vulnerable. Candidates generally fared well on this part, both in drawing from provisions and explaining their relevance.

By contrast, candidates generally did not perform as well on Part 2 (also carrying 10 marks), which required candidates to consider the courts' record (giving at least two examples) in protecting minorities/vulnerable candidates, taking into account the margin of appreciation doctrine. Many candidates only described elements of the margin of appreciation doctrine without much thought as to the requirements of the question.

Part 3 (which also carried 5 marks) then required candidates to outline available constitutional remedies and to evaluate their effectiveness. Again, many of the candidates simply described the available remedies without offering any evaluation as per the question.

Question 5

This question was the second most popular, being attempted by 143 out of the 154 candidates. However, it had the lowest pass rate, at 69%.

The question was divided into two parts. Part (1), which carried 10 marks, required the candidates to consider whether the matter in question, concerning an amendment to the Fugitive Offenders Ordinance, ought to be referred to the National People's Congress Standing Committee for an interpretation. Candidates were required to draw from the usual jurisprudence, including the two-part test for making a reference in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [89].

Most candidates successfully identified the appropriate principles, but the standard of their answers varied quite considerably when it came to the application of these principles to the factual scenario in the question. This lack of detailed application meant that many of the candidates scored only borderline passes, and a considerable number failed.

Part 2 (which carried 15 marks) required candidates to consider the Court of Final Appeal's power to review the validity of an Interpretation of the Basic Law by the National People's Congress Standing Committee. Candidates had to engage with the jurisprudence and discuss relevant case law, in particular: *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, [57]–[58] (Li CJ); *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, [107]; *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26; *Ng Ka Ling v Director of Immigration* (No 2) (1999) 2 HKCFAR 141; *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, 478.

Again, the answers to part (2) varied greatly in quality. However very few engaged with the nuances of this question and all the applicable jurisprudence.

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3. Past Examination Papers from 2017 to 2019

**2017 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Thursday, 26 October 2017



2017 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

A senior member of the PRC Government is on an official visit to Hong Kong. The event generates strong emotions among the local community, with a number of protestors gathering in Central. Some of the protestors carry pro-democracy banners and chant slogans about the state of democracy in Hong Kong and "Mainland interference". Other protestors carry "pro-Beijing" banners and chant slogans about local groups undermining national unity. One protestor (Brian), initially part of the "pro-Beijing" group of protestors, is particularly enthusiastic about national unity being upheld. He breaks free from the group and becomes more boisterous. The police warn Brian to calm down, however he ignores police warnings and begins to loudly make claims that, by failing to arrest the pro-democracy protestors, the police are "allowing separatists to undermine national unity". At this stage, the police arrest Brian for committing a public order offence.

Brian claims that the arrest violates his constitutional rights to freedom of speech, assembly and demonstration. He also claims that his arrest is unlawful and unconstitutional, as he was merely promoting the concept of the Hong Kong Special Administrative Region being an inalienable part of the PRC, and pointing out that the police had a duty to prevent "separatists" doing or saying anything which undermined national unity. He therefore claims that he was "forcing the police to uphold their obligation to national unity".

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

Brian's constitutional challenge is rejected by the courts. He appeals unsuccessfully to the Court of Final Appeal, which disposes of Brian's case without seeking an interpretation of any provision in the Basic Law from the National People's Congress Standing Committee ("NPCSC"). Brian is furious and states that he wants to "appeal to the NPCSC". He also states that the Court of Final Appeal was under a constitutional obligation to seek an interpretation of the Basic Law on freedom of speech, assembly and demonstration as they relate to a protestor who was, as Brian claimed, "forcing the police to uphold their obligation to national unity".

Questions:

- (1) Can Brian appeal the case from the Court of Final Appeal to the NPCSC? Explain your answer with reference to the Sino-British Joint Declaration and the Basic Law.**

(10 marks)

- (2) Could a feasible argument be made that the Court of Final Appeal should have sought an interpretation of one or more provisions of the Basic Law from the NPCSC in this case? Explain your answer.**

(15 marks)

Question 2 (25 marks)

Your client is the employer of a foreign domestic helper ("FDH"). As part of the process of obtaining immigration clearance for the FDH to work in Hong Kong, your client and the FDH were each required to sign:

- (a) a standard form contract of employment providing *inter alia* that the FDH will 'work and reside in the Employer's residence ...'; and
- (b) a standard form written undertaking to the Hong Kong Special Administrative Region ("HKSAR") government that the FDH would reside only in the residence stated in the contract.

There is no legislative basis to the above forms. They are internal administrative forms used by the Director of Immigration ("DOI") in processing applications for FDHs to live and work in Hong Kong. The DOI's legal power in such cases is the general discretionary power under the Immigration Ordinance (Cap. 115) ("IO") to permit non-Hong Kong permanent residents to live and work in the HKSAR.

Your client and the FDH both prefer a live-out arrangement. As a result, the FDH lives in a room with her husband in a shared flat in another part of the city. Your client has all along been providing a subsidy to cover the FDH's share of the flat rental. Each workday morning the FDH travels by bus to your client's home to report for work, and each evening she returns home to the shared flat.

Your client and the FDH have both been arrested and charged by the Immigration Department. It is alleged that each of them is guilty of making a false statement to an immigration officer, contrary to section 42(1)(b) of the IO. The particulars of the offence specify that the alleged false statement is the standard form written undertaking.

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

Article 12(1) of the International Covenant on Civil and Political Rights ("ICCPR") provides:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Similarly, article 8(1) of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO") provides:

Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.

Your client and the FDH have both been released on bail. They have been summoned to appear before a Magistrate in March 2018. Your client is willing to admit the facts on which the charge against him is based, but wishes to plead not guilty and defend the charge on the basis of the rights guaranteed by the ICCPR and HKBORO, as set out above.

Questions:

- (1) In which forum should your client's legal defence be raised? Can it be raised before the Magistrate, or would it be more appropriate to apply for judicial review before the trial?**

(10 marks)

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

(2) Advise your client, with full explanation, of the chances of success of his proposed legal defence based on the provisions of the ICCPR and HKBORO cited above.

(15 marks)

[Note: Apart from advising on the appropriate forum for your client's legal defence, you are not required to advise on any procedural steps in relation to this court case.]

Question 3 (25 marks)

The Government of the Hong Kong Special Administrative Region had long planned to extend the South East New Territories ("SENT") Landfill in Tseung Kwan O into the Clear Water Bay Country Park ("CWBCP"). In 2010, the Environmental Protection Department commissioned a study on the potential to extend the SENT Landfill. In 2015, "A Policy Framework for the Management of Municipal Solid Waste (2015-2020)" was issued and it was estimated that the SENT Landfill would be exhausted in 6 to 10 years.

As the proposed extension would encroach upon the CWBCP, the Administration invoked s.15 of the Country Parks Ordinance (Cap. 208) ("Ordinance") to replace the original approved map of the CWBCP with a new map of the CWBCP which excluded the area designated for the extension of the SENT Landfill from the new boundaries for the CWBCP.

The replacement of the original approved map of the CWBCP with a new map of the CWBCP followed the procedures laid down in ss. 13-14 of the Ordinance:

- 1) The Chief Executive ("CE") in Council's approval of a draft map under s.13(1);
- 2) Its signature by the Country and Marine Parks Authority and deposit in the Land Registry under s.13(4);
- 3) The notification by Gazette of the deposit of the approved map under s.13(5);
- 4) The CE's designation of the area shown in that approved map to be a country park by order in the Gazette under s.14.

Upon completion of these procedures, the Country Parks (Designation) (Consolidation) (Amendment) Order 2017 ("Order") was made by the CE on 31 March 2018. It was supposed to come into operation on 1 November 2018.

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

The Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2018 ("Subcommittee") was formed to consider the Order, which was tabled before the Legislative Council ("Legco") in April 2018. Meanwhile, objections against the extension were raised by different stakeholders. These culminated in a cross-party plan in Legco to move a resolution to repeal the Order.

The Government insisted that Legco does not have the constitutional power to repeal an Order properly made under the procedures laid down in the Ordinance. Nevertheless, the Legco President ruled that Legco members do have the power to move the proposed resolution and, on 13 June 2018, they overwhelmingly passed a resolution repealing the Order.

The CE and her administration believe that the Legco President's ruling is incorrect, and that Legco has acted ultra vires in passing this resolution. They have decided to bring an action for leave to seek judicial review in relation to both the Legco President's ruling and the passing of the 13 June 2018 resolution.

[Sections 13-15 of the Country Parks Ordinance (Cap. 208) state as follows:

Section 13. Power of Chief Executive in Council upon submission of draft map

- (1) Upon submission of a draft map under section 12, the Chief Executive in Council shall —
 - (a) approve the draft map;
 - (b) refuse to approve it; or
 - (c) refer it to the Authority for further consideration and amendment.

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

- (2) Where the Chief Executive in Council refuses to approve a draft map under subsection (1)(b), the Authority shall as soon as possible after such refusal give notice in the Gazette of such refusal.
- (3) The Chief Executive in Council may by order published in the Gazette correct any omission from or error in any map approved by him.
- (4) Every map approved by the Chief Executive in Council shall be signed by the Authority and shall be deposited in the Land Registry.
- (5) The deposit of maps under subsection (4) shall be notified in the Gazette.
- (6) The Authority shall supply a copy of an approved map to any person upon payment of such fee as the Authority may determine.

Section 14. Designation of country parks

Where the Chief Executive in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive shall, by order in the Gazette, designate the area shown in the approved map to be a country park.

Section 15. Replacement or amendment of approved maps

- (1) The Chief Executive in Council may refer any map approved by him under section 13 to the Authority for replacement by a new map or for amendment.
- (2) Upon any reference under subsection (1), sections 8 to 14 shall apply in respect of a new map in replacement of the map referred to or any amendment to the map referred in like manner as they applied to the map it replaces or amends;

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

and where the reference is in respect of an amendment the word "map" (地圖) in sections 8 to 14 shall be construed as referring to the map showing the amendment.

- (3) A map referred to the Authority shall be replaced by the new approved map or read as one with any approved amendment as the case may be.
- (4) The Land Registrar shall endorse accordingly the map deposited under section 13 which has been replaced or amended and shall cause the copies of the maps deposited in the Land Registry to be similarly endorsed.]

Questions:

You are instructed by the Legco President to advise on:

- (1) the proper constitutional arrangement and relationship between the different branches of government under the Basic Law; and**

(10 marks)

- (2) the appropriate legal principles already tested in case law that can be deployed to defend Legco against a court action concerning its internal procedures, and whether these principles would be applicable in any legal action brought concerning the Legco President's ruling and this resolution.**

(15 marks)

[Note: You are not required to advise on any procedural steps in relation to bringing an action for leave to seek judicial review.]

Question 4 (25 marks)

In the case of *Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others* (HCAL31/2015), Ms. Leung sought to challenge three decisions of the Government of the Hong Kong Special Administrative Region ("HKSAR"): (a) the decision to commence public consultation on the method of selecting the Chief Executive ("CE") of Hong Kong in the form of the consultation document ("the Consultation Document") issued on 7 January 2015; (b) the decision to issue the Consultation Document itself; and (c) the decision to issue the Consultation Report and Proposals on the "Method for Selecting the CE by Universal Suffrage" dated 22 April 2015 ("the Consultation Report and Proposals"). She failed to get leave to seek judicial review.

Ms. Leung has two queries. The first is about an alleged inconsistency between the wording of Article 7 of Annex I to the Basic Law and a 2004 Interpretation of this provision in the Basic Law issued by the National People's Congress Standing Committee ("the NPCSC").

Article 7 of Annex I provides:

"If there is a need to amend the method for selecting the CEs for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the CE, and they shall be reported to the NPCSC for approval."

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

The relevant section of the 2004 Interpretation issued by the NPCSC states:

"3 ... The CE of the HKSAR shall make a report to the [NPCSC] as regards whether there is a need to make an amendment; the [NPCSC] shall, in accordance with the provisions of Articles 45 and 68 of the [Basic Law], make a determination in light of the actual situation in [Hong Kong] and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the method for selecting the CE and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the HKSAR into the Legislative Council."

Article 7 of Annex I contains three steps for amending the method for selecting the CE, while the 2004 Interpretation has added two additional steps. There seems to her to be an obvious inconsistency between the two.

Ms. Leung's second query relates to the constitutionality of provisions in the 31 August 2014 Decision issued by the NPCSC ("the 8-31 Decision") on issues relating to the proposed introduction of universal suffrage for the selection of the CE. In her failed application for leave to seek judicial review, Ms. Leung's counsel made the following submission:

"Pursuant to the 2004 Interpretation, after receiving the CE's report submitted under step 1 in recommending the need to amend the method for selecting the CE, the NPCSC can only under step 2 decide whether or not to confirm that there is a need to amend the said method. It cannot, in confirming the need to amend, also decide on the "contents" of the amendments, that is, what the proposed amendments or the terms of the amendments should be. This is so as in the 2004 Interpretation, it is stated (in its

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

original Chinese text) that the CE shall submit the report for the NPCSC to (in accordance with Basic Law 45 and 68 and in light of the actual situations of the HKSAR and in accordance with the principles of orderly and gradual progress) "確定". The Chinese words "確定" can mean only "confirm" or not alone but nothing else."

Ms. Leung is of the view that the argument advanced by her counsel may be used to question the constitutionality of the 8-31 Decision. She also believes that, based on the differing status accorded to various parts of the NPCSC's 1999 Interpretation of the Basic Law by the Court of Final Appeal in *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211, it can be argued that some parts of the 8-31 Decision do not have binding effect.

[The relevant parts of the 8-31 Decision state as follows:

At Paragraph I: "Starting from 2017, the selection of the CE of the HKSAR may be implemented by the method of universal suffrage";

At Paragraph II: "When the selection of the CE of the HKSAR is implemented by the method of universal suffrage:

- (i) A broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth CE.

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

- (ii) The nominating committee shall nominate two to three candidates for the office of CE in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee.

...”]

Questions:

Prepare an advice on the following issues:

- (1) **The differences between the interpretative approaches adopted by Hong Kong courts and the NPCSC;**

(5 marks)

- (2) **Whether Ms. Leung has an arguable case on the unconstitutionality of the 2004 Interpretation by the NPCSC;**

(10 marks)

- (3) **Whether, as a Decision of the NPCSC, the 8-31 Decision is reviewable by the courts, with reference to relevant case law.**

(10 marks)

Question 5 (25 marks)

X and Y have been in a long-term same sex relationship. X was born in Hong Kong and holds permanent residency, whereas Y is a British national and resident. Following the introduction of legislation by the UK parliament recognising same-sex marriages [Marriage (Same Sex Couples) Act 2013], X and Y entered into a marriage in the UK.

X and Y have been living in the UK for a long period of time but decided that they wanted to permanently relocate to Hong Kong. To do so, Y required a visa. The dependant visa policy provides that the Immigration Department will consider applications from those dependants who are either the (i) spouse, (ii) a child, or (iii) parent over 60, of the sponsor. Y therefore applied for a dependant visa on the basis that he was X's spouse.

The Director of Immigration ("Director") refused the dependant visa on the ground that Y was not X's "spouse". The Director followed the definition of "spouse" adopted in Hong Kong in Section 40 of the Marriage Ordinance (Cap. 181):

- (1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.
- (2) The expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others.

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

Y wants to challenge the definition of marriage in Section 40 of the Marriage Ordinance and the Director's construction of "spouse" in the dependant visa policy.

Questions:

Prepare a memorandum for Y on the following:

- (1) **Whether Y, as a non-resident, is able to challenge the constitutionality of Section 40 of the Marriage Ordinance (Cap. 181) and the Director's construction of "spouse" in the dependant visa policy.**

(5 marks)

- (2) **The Executive may argue that same sex marriage is a sensitive issue which should only be recognised once there is enough societal consensus in Hong Kong. Should the court therefore apply a "margin of appreciation" to the Legislative Council and Executive on this issue?**

(10 marks)

- (3) **What advice would you give to Y with respect to a possible legal challenge to Section 40 of the Marriage Ordinance (Cap. 181) under the Basic Law and Hong Kong Bill of Rights Ordinance (Cap. 383).**

(10 marks)

[Note: You are not required to include in your answer details of the procedural steps in relation to a possible legal challenge.]

END OF TEST PAPER

**2018 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Thursday, 1 November 2018



2018 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

The Preamble of the Basic Law of the Hong Kong Special Administrative Region ("HKSAR") states that:

Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems", the socialist system and policies will not be practised in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.

In accordance with the Constitution of the People's Republic of China, the National People's Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong.

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

Article 31 of the Constitution of the People's Republic of China ("PRC") ("Constitution") stipulates that:

The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.

Taken together, Article 31 of the Constitution and the Basic Law of the HKSAR have created a new type of central-local relationship, that is very different from all other types of central-local relationships within the PRC. Hong Kong and Macau, as Special Administrative Regions, exercise a high degree of autonomy and enjoy a special constitutional and political status.

Questions:

You are asked to write a briefing note for a group of overseas clients who are about to pay their first visit to Hong Kong and seek your advice on Hong Kong's status within the PRC, with particular reference to the following issues:

- (1) The nature of the structure of the Chinese state after the establishment of the Hong Kong and Macau Special Administrative Regions.**
(5 marks)

- (2) The division of powers between the HKSAR and the central authorities under the principle of "one country, two systems" and the Basic Law, with particular reference to those powers exercised by the central authorities.**
(12 marks)

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

(3) The interaction between the HKSAR and the central authorities, with particular reference to when the central authorities can directly intervene in the running of the HKSAR. In order to enable your clients to better understand the situation in this respect, you are advised to give at least two specific examples of the exercise of such powers by the central authorities.

(8 marks)

Question 2 (25 marks)

Anthony and Poppy are local environmental activists who are concerned about air pollution in Hong Kong issuing from industrial and commercial sources in Guangdong province. They were recently elected as members of the Legislative Council on a "clean air" political platform. During Legislative Council debates and meetings, Anthony and Poppy sometimes chant offensive slogans about the authorities in Guangdong province in Mainland China. They are engaging in this behaviour increasingly regularly, which is proving disruptive to proceedings. The President of the Legislative Council (the "President"), who wants to be as fair as possible and show tolerance for diverging political views, has asked Anthony and Poppy over the course of several weeks to stop chanting these slogans during debates and meetings. So far, Anthony and Poppy have ignored the President's requests. Increasingly, public gatherings are being held by supporters of Anthony and Poppy to claim that the failure of the Government of the Hong Kong Special Administrative Region ("HKSAR Government") to challenge the Mainland Chinese authorities over air pollution shows that the "one country, two systems" model is "not working".

The HKSAR Government is worried that the actions of Anthony and Poppy will upset the authorities in Mainland China, and bring the Legislative Council and the HKSAR into disrepute. The Chief Executive therefore launches judicial review proceedings to require the President to declare that Anthony and Poppy are no longer qualified for the office of Legislative Councillor under Article 79(1) of the Basic Law, which states that:

The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:

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

- (1) *When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons.*

The Chief Executive argues in the judicial review proceedings that Anthony and Poppy have lost the ability to discharge their duties as a result of their persistent, wilful refusal to comply with the directions of the President, which the Chief Executive argues to be covered by the words "or other reasons" in Article 79(1) of the Basic Law.

The Chief Executive's decision to launch judicial review proceedings is condemned by a large number of members of the legal community in Hong Kong, who argue that it amounts to an assault on the rule of law. The Chief Executive asserts standing in those proceedings on the basis of Article 48(2) of the Basic Law, which states that:

The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions: ...

- (2) *To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region.*

The judicial review proceedings comprise two distinct parts. The first part of the proceedings seek interim remedies to restrain Anthony and Poppy from continuing to take their seats as members of the Legislative Council. The court refuses to grant those interim remedies. The second set of proceedings seek orders of mandamus to compel the President to declare that Anthony and Poppy are no longer qualified for the office of Legislative Councillor under Article 79(1) of the Basic Law. The second

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

part of the proceedings are currently in progress, but it is widely expected that the National People's Congress Standing Committee ("NPCSC") will issue an interpretation of Article 79(1) of the Basic Law which would effectively require the President to declare that Anthony and Poppy are no longer qualified for the office of Legislative Councillor. It is expected that the NPCSC will issue its interpretation before judgment is given in the second set of judicial review proceedings.

Questions:

You represent Poppy in the second set of judicial review proceedings. Poppy asks you to advise her on the following issues:

(1) Whether the ability of the NPCSC to issue an interpretation of Article 79(1) of the Basic Law, before judgment is given in the second set of judicial review proceedings, represents a threat to the separation of powers and the rule of law? Explain your answer.

(15 marks)

(2) Can arguments be advanced to claim that the standing of the Chief Executive asserted on the basis of Article 48(2) of the Basic Law jeopardises the rule of law? If so, what arguments could the Chief Executive be expected to advance in response, to suggest that standing asserted on this basis serves to uphold the rule of law?

(10 marks)

You are not expected to show detailed knowledge of Legislative Council procedures in sub-questions (1) or (2) of your answer.

Question 3 (25 marks)

You are a newly admitted solicitor in the Hong Kong office of a large international firm. Pro bono advice is provided by the firm to disadvantaged members of the community as part of its policy of 'giving back'.

A human rights advocacy group has referred the case of Miss X to your firm. The main concern is delay in a criminal case against Miss X, who has been in custody for 4 years.

Reading the file, you see that the basic facts are as follows:

1. Miss X was previously employed as a domestic helper by Madam Y.
2. On 17 July 2014, Miss X was arrested and charged with theft from Madam Y.
3. The alleged theft was of an emerald brooch said by Madam Y to be worth hundreds of thousands of dollars.
4. Miss X denies the charge. She says that the allegation of theft was made up by Madam Y as an excuse to terminate the employment without notice after an argument between the two over Miss X's alleged failure properly to 'hand wash' Madam Y's undergarments.
5. Miss X has photo evidence which she claims shows Madam Y wearing the brooch at a gala dinner several months after the theft allegedly took place.

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

6. When Miss X appeared before a magistrate she requested that her case be transferred to the Court of First Instance so that she could have a jury trial. Her application was denied.
7. At the same time, bail was refused on the basis of the prosecution's objection that Miss X was a flight risk on account of the seriousness of the alleged crime and the strength of the evidence.
8. Miss X then applied for judicial review of the refusal to transfer her case to the Court of First Instance. She was unsuccessful. She also applied for bail in the Court of First Instance, again without success.
9. Eventually, Miss X's case was transferred to the District Court for trial. Trial took place before His Honour Judge Z over 7 days in September 2016. The judge found Miss X guilty and sentenced her to 6 years in prison, saying she was a greedy woman who had breached the trust of her employer.
10. During the 7-day trial there had been long exchanges between Miss X and the court interpreter engaged to translate the evidence to and from Tagalog, the main language of the Philippines. Miss X complained that she did not understand Tagalog well, as she had grown up speaking another dialect. At the time, this complaint was made only to the court interpreter and was not explained to the court, nor to the lawyers involved.
11. Miss X successfully appealed against conviction. The Court of Appeal found that the interpretation provided to Miss X at trial had been inadequate. A re-trial before a different District Court judge was ordered.

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

12. It is now late 2018. Miss X has been in custody for over 4 years while the legal proceedings have been on-going. Her re-trial in the District Court has been fixed for February 2019. Unless granted bail in the meantime, by the commencement of the re-trial Miss X will have been in custody for 4 years and 7 months.

According to Article 9(3) of the International Covenant on Civil and Political Rights ("ICCPR") , and Article 5(3) of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"):

Anyone arrested or detained on a criminal charge ... shall be entitled to trial within a reasonable time or to release ...

Article 11(2)(c) of the HKBORO and Article 14(3)(c) of the ICCPR provide:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...
(c) to be tried without undue delay

You have written to the prosecution raising Miss X's concerns about violation of her right to trial without undue delay. They do not deny that there has been excessive delay. However, they take the view that Miss X is herself partly to blame for the delay because of the judicial review application, and the fact she did not complain about inadequate interpretation during the first trial. As a result, the prosecution intends to proceed with the re-trial.

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

Questions:

You are asked to prepare a note, with reasons, advising on the following three points:

- (1) Have Miss X's rights been infringed? Explain, with full reasons.**
(15 marks)

- (2) Assuming Miss X's rights have been infringed, which remedy or remedies might be available? Explain briefly, and choose a remedy or remedies which you would advise Miss X to seek.**
(5 marks)

- (3) In which court, tribunal or other forum would any such remedy best be sought? Explain your answer briefly.**
(5 marks)

Question 4 (25 marks)

E suffered from motor neurone disease at the time of her death. E was diagnosed with motor neurone disease in June 2014. At first, E was able to carry on her life as normal. But after time, the common symptoms of the disease began to show, including muscle deterioration. E found it more and more difficult to do things herself. She became increasingly dependent on her husband, M, a medical doctor. By mid 2016, E's deterioration was such that she became confined to an electric wheel-chair.

E did not want the pain to increase to a point where her life was utterly unbearable and her death undignified. She wanted to end her life before then. However, as E would in the future be in a condition where she would be unable to do anything without the assistance of another, she needed help to commit suicide. She therefore discussed with M her wish to end her life when the time came. M, although devastated by her deteriorating condition, wanted her death to be dignified. He agreed to help E carry out her wish.

However, E was worried about what would happen to M if he helped her commit suicide. She was concerned that he would be prosecuted. This is a possibility under section 33B of the Offences Against the Person Ordinance (Cap. 212) ("OAPO"), which provides:

33B. Criminal liability for complicity in another's suicide

- (1) *A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence triable upon indictment and shall be liable on conviction to imprisonment for 14 years.*

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

- (2) *If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of the offence so proved.*
- (3) *No proceedings shall be instituted for an offence under this section except with the consent of the Secretary for Justice.*

She wrote to the Secretary for Justice to seek assurances that M would not be prosecuted. She also asked about the circumstances under which the Secretary for Justice, would prosecute someone who assisted another to commit suicide. The Department of Justice replied:

We would like to express our deepest sympathy for your condition and the suffering you and your family have to bear...You have asked for an undertaking that M would not be prosecuted under section 33B of the Offences Against the Person Ordinance (Cap. 212), in the event he assisted you to commit suicide. We are unable to grant any immunity or assurance of non-prosecution in the event that your husband helped you to commit suicide. Instead, we will evaluate whether a prosecution is warranted in this case in accordance with our general policy applied to all prosecutions, which looks to whether a prosecution ought to be brought in the public interest.

By March 2018, E was feeling pain on a greater level than before. While being uncertain whether he would be prosecuted, M was adamant that he would help E regardless. In April 2018, M helped E overdose on methadone. E died with her closest friends and family around her bedside.

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

The Hong Kong police learnt of E's death by methadone overdose. They arrested and charged M on suspicion of an offence contrary to section 33B of the OAPO. Pursuant to section 33B(3), the Secretary for Justice gave his consent for M to be prosecuted for an offence under that section. M then commenced judicial review proceedings on the ground that section 33B was unconstitutional and that the Secretary for Justice should not have consented to the prosecution.

The Court of First Instance ("CFI") rejected M's application. First, they held that section 33B was consistent with the Basic Law and Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"), as it could not be said on reasonable construction that there was 'a right to die with the assistance of another' in these instruments. Second, they held that there was no basis to review the Secretary for Justice's decision to consent to the prosecution as this was shielded by Article 63 of the Basic Law, which provides: "*The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.*" Accordingly, the courts were unable to review the decision of the Secretary for Justice, as to do so would amount to an 'interference'.

Questions:

You are to assist in drafting the grounds of appeal.

(1) Advise whether section 33B of the OAPO infringes any rights under the Basic Law and/or the HKBORO.

(20 marks)

(2) Assuming that section 33B of the OAPO is constitutional, do you agree with the CFI's conclusion that Article 63 of the Basic Law shields the decision of the Secretary for Justice from judicial review?

(5 marks)

Question 5 (25 marks)

Your client, Small Homes Ltd., is a major property developer in Hong Kong with a large bank of land. They are concerned about the implications for their business of what they describe as "expiry of one country, two systems" after 30 June 2047 and believe the Hong Kong Basic Law, as currently worded, offers little guidance on what will happen after this date. Small Homes Ltd. approach the Central People's Government, which states that it would be willing to support an amendment to the Hong Kong Basic Law stipulating that "subject to acceptable behaviour by the residents of the Hong Kong Special Administrative Region, the existing 'one country, two systems' arrangements may continue beyond 30 June 2047". However, many members of the Legislative Council of the Hong Kong Special Administrative Region ("HKSAR") are angry at what they perceive as a threat contained in the wording of this proposed amendment and, as a result, more than half of all lawmakers declare they would oppose any amendment that includes wording that refers to "acceptable behaviour by the residents of the HKSAR".

Question:

- (1) Advise Small Homes Ltd. on the most relevant provisions in the Hong Kong Basic Law concerning Hong Kong's future after 30 June 2047, with particular reference to any provisions relevant to the continuation of government land leases beyond that date, and on whether it would be possible to initiate an amendment to the Hong Kong Basic Law under the circumstances stated above.**

(15 marks)

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

Opposition to the proposed amendment to the Hong Kong Basic Law subsides after the Central People's Government agrees that the wording referring to "acceptable behaviour by the residents of the Hong Kong Special Administrative Region" requirement can be deleted, and a modified version of the amendment is rushed through the National People's Congress. However, due to lack of time, no committees of either the National People's Congress or its Standing Committee are consulted beforehand.

Question:

- (2) Advise Small Homes Ltd. on whether there are any grounds to be concerned about the legal validity of the amendment adopted by the National People's Congress and, if so, whether the issue would be subject to the jurisdiction of the courts of the HKSAR.**

(10 marks)

END OF TEST PAPER

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Friday, 1 November 2019



2019 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

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