

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2022 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;
- National Security Law of the HKSAR;
- 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, 2nd edition, 2019);
- Johannes Chan SC (Hon) & C.L. Lim, *Law of the Hong Kong Constitution* (Sweet & Maxwell Asia, 3rd edition, 2021);
- 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 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;
- 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 2019, 2020 and 2021 Examinations

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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OLQE Examiners' Comments 2020

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by all 110 candidates who sat the exam. It had the highest pass rate of any question, at 94%.

The question asked candidates to prepare a briefing note explaining what is meant by "one country, two systems" and how it is implemented under the Basic Law, and what powers the National People's Congress Standing Committee (NPCSC) has under the Basic Law in relation to Hong Kong affairs.

Part 1 (carrying 10 marks) was generally well answered by most candidates. A number of Basic Law articles could be cited in support of the answer, such as Articles 1, 10, 12, 13 and 14 in relation to the "one country" aspect, and Articles 2, 5, 8, 18 and 19 in relation to the "two systems" aspect. Citation of other articles of the Basic Law was also accepted where relevant and appropriate. Candidates were also expected to demonstrate understanding of the meaning of one country, two systems, rather than a mere listing of relevant Basic Law articles, noting that the question asked candidates to "explain" the issue. Strong answers therefore tended to describe what is meant by one country, two systems, explain its meaning and significance, and cite relevant articles of the Basic Law such as those stated above.

Part 2 (carrying 15 marks) was also generally well answered. The main powers of the NPCSC which were expected to be cited included those in Articles 17, 18 (and Annex III), 20 and 158 of the Basic Law. Answers which did not include discussion of Article 158 of the Basic Law had marks deducted, as this has been one of the main and arguably most important mechanisms by which the NPCSC has exercised its powers in relation to Hong Kong affairs. Some additional marks were awarded where candidates included examples of NPCSC interpretations, rather than an unelaborated referral to Article 158 of the Basic Law, as part of a fuller answer to the question. A recurring mistake was to claim that the NPCSC has the power to amend the Basic Law under Article 159, whereas that power is possessed by the National People's Congress (NPC). The NPCSC instead has the power to propose bills for amendment to the Basic Law. Several candidates failed to understand the distinction between the NPC and the NPCSC, and others incorrectly regarded the NPCSC and the Central People's Government as the same thing.

Some strong answers also discussed the role of NPCSC decisions in relation to Hong Kong affairs, which attracted bonus marks where properly discussed.

Question 2:

This question was relatively less popular, being attempted by 64 out of the 110 candidates who sat the exam. It had a pass rate of 77%.

This is a case study question divided into two parts and required candidates to understand the law, theory and application in order to get a high mark.

Part 1 (carrying 10 marks) required candidates to consider whether challenges can be mounted against the constitutionality of the statutory provisions given in the question and, if so, to identify the correct respondents. Candidates were generally able to answer correctly in relation to the issue of whether challenges can be mounted to the constitutionality of these statutory provisions, with good candidates referring to relevant provisions in the Basic law, case law and legal theory. However candidates were often confused about the correct respondents and in a significant number of cases omitted one of the respondents.

Part 2 (carrying 15 marks) required candidates to consider whether or not the courts of the Special Administrative Region have the jurisdiction to hear such constitutional challenges and, if so, what would be the most effective grounds for mounting such challenges. Most candidates correctly identified the courts' jurisdiction to hear such challenges, and many referred to relevant authority such as *Ng Ka Ling*. However the issue of the most effective grounds for such challenges was less well answered with many inadequate answers. Only a relatively small number were able to correctly cite and refer to relevant issues such as delegation of power, proportionality and the "prescribed by law" requirement, while even fewer were able to discuss permissible restrictions on human rights.

Question 3

This question was the least popular, being attempted by 63 out of the 110 candidates who sat the exam. However it had the second highest pass rate, at 83%.

The question concerned human rights and asked candidates to discuss the question of whether persons in Hong Kong without the right of permanent residence, or even illegally, are entitled to the benefit of the rights set out in Chapter III of the Basic Law. Chapter III includes Article 39, by which the International Covenant on Civil and Political Rights is entrenched in Hong Kong's constitutional system.

This question was set because there had been indications in previous years that some candidates had the impression that Chapter III rights were only for the benefit of permanent residents, or lawful residents. That is a dangerous concept and could mean that a non-permanent resident would not be entitled to the usual rights in a criminal trial, such as the right to counsel, the presumption of innocence and so on.

It was pleasing to note that the great majority of candidates were able to answer correctly that the fundamental rights in Chapter III, for the most part, endure to the benefit of everyone in Hong Kong. Most candidates were aware of BL 41, which expressly stipulates that persons in the HKSAR "other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed by this chapter".

Most candidates were able to confine the "immigration reservation" (in the HK Bill of Rights Ordinance, whereby the government reserved the right not to apply the normal guaranteed rights in certain immigration situations) to cases concerning the exercise of delegated power in matters concerning entry into and stay in the HKSAR. They were also able to distinguish the CFA's decision in *Vallejos* (foreign domestic helpers not entitled to right of abode) as one concerning the factual question of whether foreign domestic helpers are ordinarily resident, not with legal rights.

Overall the performance of candidates on this question was more than satisfactory.

Question 4

This question was the second most popular, being attempted by 102 out of the 110 candidates. It had the second lowest pass rate, at 73%. However, many of the candidates who failed did so only marginally (e.g. with several marks of 13 out of 25).

The question was divided into two parts and invited candidates to consider, based upon judicial statements of the former Chief Justice Andrew Li in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, whether (1) the HKSAR courts are entitled to declare an NPC/NPCSC legislative act to be invalid where it is adjudged to contravene the Basic Law; and (2) whether, and to what extent, the HKSAR courts are able to adopt a ‘remedial interpretation’ (to either sever, read in, read down, or strike out language of a statutory provision) as a means to resolve an interpretive conflict between NPC/NPCSC promulgated legislation and fundamental rights under the Basic Law.

Part 1 (carrying 15 marks) required candidates to evaluate the scope of judicial power under the Basic Law (including Articles 11, 158, 159) and the framework of Chinese law in which the Basic Law was promulgated. Important authority that the candidate needed to contextualise their answer included *Ng Ka Ling v Director of Immigration* (No 2)(1999) 2 HKCFAR 141 and *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460. Generally speaking, the vast majority of the candidates were able to engage with this question and draw from appropriate authority in constructing their analysis.

Part 2 (carrying 10 marks) required candidates to engage with relevant authority recognising the power of the courts to apply a remedial interpretation and the form that this can take. From this authority, candidates were then required to consider the extent to which the HKSAR courts are able to interpret conflicts where the source of conflict is NPC/NPCSC legislation and the role of rights in this interpretive exercise. The general response to this sub-question was disappointing, with many candidates only describing the concept of remedial interpretation without going that step further to engage with the question asked.

Question 5

This question was quite popular, having been attempted by 99 of the 110 candidates. Its pass rate was 71%. However, many of the candidates who failed did so only marginally (e.g. with several marks of 13 out of 25).

The question was divided into two parts and invited candidates to consider: (1) the conditions under which a judicial reference to the Standing Committee of the National People's Congress is required; and (2) the constitutional basis for the Chief Executive to make a referral to the Standing Committee of the National People's Congress, and whether the lack of any such basis would have any effect on the validity of an Interpretation rendered by the Standing Committee of the National People's Congress.

Part 1 (carrying 15 marks), required candidates to support their answer with a critical analysis of the application of these conditions by reference to *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95. Candidates were required to identify the principle that the Court has a duty to make a reference to the NPCSC for Interpretation of a provision of the Basic Law if two conditions are satisfied: the 'classification' condition and the 'necessity' condition: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [89]. Candidates were required to explain 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 asked to critique this judgment. This involved an analysis of the Court's central claim that Articles 13 and 19 were excluded provisions, of which the case could not be resolved without a determination of the questions of interpretation affecting the meaning of these provisions. Candidates generally fared well in identifying the two referral conditions although many papers were lacking the critical analysis required on *FG Hemisphere*.

Part 2 (carrying 10 marks) required candidates to acknowledge that a referral by the Chief Executive is not a power directly stated in the Basic Law. In particular, it is not mentioned in Article 158 and can be seen as giving the Government a quasi-right of appeal. However, the Chief Executive had done so following *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 in 1999, and again in 2005. In both cases this was done by making a report to the State Council under Article 48(2) of the Basic Law, which in both cases resulted in the State Council then submitting the request for interpretation to the Standing Committee. Candidates should have noted the plenary authority of the NPCSC to make an Interpretation on any part of the Basic Law, which is stated in Article 67(4) of the Constitution and was acknowledged by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, [6]; *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, [56]–[57]. As a result, candidates would likely have noted the unlikelihood that procedural irregularity under Article 158 would invalidate an Interpretation rendered by the NPCSC. However, candidates who put forward convincing arguments to the contrary still achieved a good mark. In contrast to Part 1, the answers to Part 2 were comparatively weaker. Most answers were rather basic and lacked analysis of the case law and other constitutional authority.

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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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3. Past Examination Papers from 2019 to 2021

**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

**2020 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 3 November 2020



2020 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

You are the solicitor for Global Fund Managers (“GFM”), a multinational investment corporation headquartered in the United States. Its Asian Regional Office has been based in Hong Kong since 2003. The partners of GFM have become increasingly concerned about the effect that months of protests and recent constitutional developments in Hong Kong may have on its business in Hong Kong. In particular, its partners have read reports about changes to how the principle of “one country, two systems” is being implemented in Hong Kong and about greater involvement by the National People’s Congress Standing Committee (“NPCSC”) in Hong Kong affairs. The partners at GFM’s headquarters contact you for advice that will better enable them to evaluate these issues and consider the possible impact on their business operations in Hong Kong.

Questions:

Prepare a briefing note for GFM explaining the following issues:

(1) What is meant by “one country, two systems” and how is it implemented under the Basic Law?

(10 marks)

(2) What powers does the NPCSC have under the Basic Law in relation to Hong Kong affairs?

(15 marks)

Question 2 (25 marks)

To cope with the outbreak of COVID-19 in Hong Kong, the Government of the HKSAR has invoked the *Prevention and Control of Disease Ordinance* (“Cap. 599”) and issued a series of regulations promulgating a wide range of emergency measures. These include the *Prevention and Control of Disease (Prohibition on Group Gathering) Regulation* (“Cap. 599G”), which was made by the Chief Executive in Council under Section 8 of Cap. 599 and came into effect on 29 March 2020. Among the provisions in Cap. 599G is a provision limiting group gatherings during wedding ceremonies to a maximum of 20 persons and banning any serving of food and drink. According to Section 16, Cap. 599G shall expire at midnight on 31 December 2020.

Vanessa and Henry, who are both from wealthy families, had spent several years preparing for a lavish wedding ceremony in April 2020, which was supposed to involve a civil registration ceremony, followed by a church celebration and a big banquet involving several hundred people. But, as a result of these restrictions, they had to cancel both the church ceremony and banquet and scale down the civil registration ceremony to 20 people.

They are furious about what they see as the government ruining the most important day of their lives, especially after the number of COVID-19 cases declined to close to zero during April 2020 which they see as proof that there was no need for such disproportionate restrictions.

They wish to take legal action and seek your advice as a lawyer with experience of judicial review.

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

Questions:

- (1) **Can Henry and Vanessa challenge the constitutionality of Cap. 599 and Cap. 599G and, if so, which institution would be the respondent/s in each case?**

(10 marks)

- (2) **Do the courts of the Hong Kong Special Administrative Region have jurisdiction to hear such challenges and, if so, what would be the most effective grounds for challenging the constitutionality of Cap. 599 and Cap. 599G respectively?**

(15 marks)

Extracts of the relevant sections of Cap. 599 and Cap. 599G are on pages 4-5.

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

Statutory Provisions Relevant to Question 2

Section 8 of Cap. 599: Public Health Emergency Regulation

- (1) On any occasion which the Chief Executive in Council considers to be an occasion of a public health emergency, he may make regulations (the regulation) for the purposes of preventing, combating or alleviating the effects of the public health emergency and protecting public health.
- (2) The Chief Executive in Council shall review from time to time, or cause to be reviewed from time to time, the public health emergency in respect of which the regulation is made.
- (3) Without limiting the generality of subsection (1), the regulation may provide for —
 - (a) ...
- (4) The regulation may provide that a contravention of any provision of the regulation is an offence punishable with a fine not exceeding level 5 and a term of imprisonment not exceeding 6 months.
- (5) In this section, public health emergency (公共衛生緊急事態) means —
 - (a) the occurrence of or the imminent threat of a disease, an epidemic or a pandemic;
 - (b) the occurrence of a novel, or highly infectious, agent or matter; or
 - (c) the widespread exposure or the imminent threat of widespread exposure of human beings to an infectious agent, that has a high probability of causing a large number of deaths in the population or a large number of serious disabilities (whether or not long-term) in the population.

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

Section 7 of Cap. 599: Power to Make Regulations

- (1) The Secretary for Food and Health may make regulations (the regulation) —
- (a) for the purpose of preventing the introduction into, the spread in and the transmission from, Hong Kong of any disease, source of disease or contamination; and
 - (b) for the prevention of any disease.

Section 3 of Cap. 599G: Prohibition on Group Gathering during Specified Period

- (1) No group gathering may take place in any public place during a specified period.
- (2) Subsection (1) does not apply to —
- (a) an exempted group gathering specified in Schedule 1; and
 - (b) a group gathering that is permitted under section 5(1).

Section 6 of Cap. 599G: Offence if Prohibited Group Gathering Takes Place

- (1) If a prohibited group gathering takes place, each of the following persons commits an offence —
- (a) a person who participates in the gathering;
 - (b) a person who organizes the gathering;
 - (c) a person who—
 - (i) owns, controls or operates the place in which the gathering takes place; and
 - (ii) knowingly allows the taking place of the gathering.
- (2) A person who commits an offence under subsection (1) is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

Schedule 1 of Cap. 599G, “Exempted Group Gatherings”, include:

- 9A. Group gathering of not more than 20 persons during a wedding ceremony at which no food or drink is served (L.N. 141 of 2020)

Question 3 (25 marks)

You have been asked to assist your supervising partner on a file concerning the rights of persons who do not enjoy permanent resident status in Hong Kong, specifically whether they are entitled to the benefit of the rights guaranteed under Chapter III of the Basic Law.

The clients are a married couple, Mr. and Mrs. Moon. Mrs. Moon is a foreign domestic helper (“FDH”) who has been charged with making a false representation to an immigration officer. Mr. Moon has been charged with aiding and abetting the offence.

The charges arise from Mrs. Moon’s domestic helper contract, which states, in accordance with the Hong Kong Special Administrative Region (“HKSAR”) government policy, that she is required to reside at her employer’s residence. In fact, when she is off work, Mrs. Moon usually stays with her husband in a rented room in another district.

As an FDH, Mrs. Moon holds a non-permanent Hong Kong identity card. Mr. Moon has only a recognizance paper issued by the Immigration Department. He came to Hong Kong as a visitor, overstayed, and is now awaiting resolution of his asylum claim.

When they first appeared in court, Mr. and Mrs. Moon asked that they be provided with an interpreter on the ground that neither of them understands English or Chinese sufficiently for court proceedings. The presiding Magistrate refused the request. She said she was satisfied that both Mr. and Mrs. Moon understand English sufficiently and that involving interpreters would slow down the trial and take up too much of the court’s time. The Magistrate directed that the trial take place in English.

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

Your firm referred Mr. and Mrs. Moon to the Legal Aid Department with a view to judicial review (“JR”) of the Magistrate’s decision. Mr. and Mrs. Moon informed the legal aid officer that although they have a basic comprehension of English, they are unable to understand it up to the level used in court.

The legal aid application was rejected on the ground there was no merit in the proposed JR. In written reasons the legal aid officer acknowledged that there is a right to an interpreter under Article 14(3)(f) of the International Covenant on Civil and Political Rights (“ICCPR”) which provides (so far as material):

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court

...

However, the legal aid officer was of the view that Mr. and Mrs. Moon are not entitled to the rights guaranteed in Chapter III of the Basic Law because they are not Hong Kong residents. With regard to Mrs. Moon, the officer said that in *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, the Court of Final Appeal held that FDHs are not ordinarily resident in the HKSAR. With regard to Mr. Moon, the officer said that illegal immigrants have no right to be in Hong Kong, let alone to benefit from the rights of residents set out in Chapter III of the Basic Law, including the ICCPR.

Mr. and Mrs. Moon are considering an appeal to a Master of the Court of First Instance against the refusal of legal aid, in accordance with the relevant statutory provisions.

Question:

You are asked to draft a note for your supervising partner on the merits of the proposed appeal. (25 marks)

Question 4 (25 marks)

You are a newly admitted solicitor. Your supervisor has asked you to prepare a research note on the scope of constitutional judicial review in the Hong Kong Special Administrative Region (“HKSAR”). Your supervisor refers you to the dictum of the former Chief Justice, Andrew Li, who, on behalf of the Court of Final Appeal, once observed in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26:

‘What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People’s Congress or its Standing Committee (which we shall refer to simply as “acts”) are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.’

Questions:

Prepare a research note addressing the extent to which legislative acts of the National People’s Congress (“NPC”) or its Standing Committee (“NPCSC”) can be scrutinised in the courts of the HKSAR with reference to the two questions listed below. You should refer to relevant constitutional provisions and cite relevant authority.

- (1) Whether the HKSAR courts are entitled to declare an NPC/NPCSC legislative act to be invalid where it is adjudged to contravene the Basic Law.**

(15 marks)

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

(2) Whether, and to what extent, the HKSAR courts are able to adopt a ‘remedial interpretation’ (to either sever, read in, read down, or strike out language of a statutory provision) as a means to resolve an interpretive conflict between NPC/NPCSC promulgated legislation and fundamental rights under the Basic Law.

(10 marks)

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. He has asked you to prepare a research brief on the two questions relating to Article 158 of the Basic Law listed below:

- (1) The conditions under which a judicial reference to the Standing Committee of the National People's Congress (“NPCSC”) is required. Support your answer with a critical analysis of the application of these conditions by reference to *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95.**

(15 marks)

- (2) The constitutional basis for the Chief Executive to make a referral to the NPCSC, and whether the lack of any such basis would have any effect on the validity of an Interpretation rendered by the NPCSC.**

(10 marks)

END OF TEST PAPER

**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