

**THE LAW SOCIETY OF HONG KONG**  
**OVERSEAS LAWYERS QUALIFICATION EXAMINATION**  
**2023 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, 3<sup>rd</sup> edition, 2022);
- Johannes Chan SC (Hon) & C.L. Lim, *Law of the Hong Kong Constitution* (Sweet & Maxwell Asia, 3<sup>rd</sup> edition, 2021);
- Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (HKU Press, 2<sup>nd</sup> edition, 1999);
- Danny Gittings, *Introduction to the Hong Kong Basic Law* (HKU Press, 2<sup>nd</sup> 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, 2<sup>nd</sup> 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 2020, 2021 and 2022 Examinations**



## **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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# OLQE Examiners' Comments 2022

## Head VI: Hong Kong Constitutional Law

### Question 1

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

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

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

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

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

## Question 2

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

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

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



### Question 3

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

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

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

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

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

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

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

## Question 4

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

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

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

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

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

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

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

## Question 5

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

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

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

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

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



### **3. Past Examination Papers from 2020 to 2022**



**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**

**2022 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG  
CONSTITUTIONAL LAW**

Tuesday, 1 November 2022







## **2022 Overseas Lawyers Qualification Examination**

### **Head VI: Hong Kong Constitutional Law**

#### **Question 1 (25 marks)**

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

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

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

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

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

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

## **Questions:**

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

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

**(5 marks)**

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

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

**(10 marks)**

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

**(10 marks)**

## **Question 2 (25 marks)**

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

Article 85 of the Basic Law states:

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

Article 88 of the Basic Law states:

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

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

### **Question:**

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

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

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

**Question:**

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

**(15 marks)**

### **Question 3 (25 marks)**

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

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

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

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

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

**Question:**

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

**(25 marks)**

#### **Question 4 (25 marks)**

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

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

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

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



## **Questions:**

**Advise John as to:**

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

**(9 marks)**

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

**(16 marks)**

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

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

## Statutory Provisions Relevant to Question 4

### Section 9 of Cap. 200: Seditious intention

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

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

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

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

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

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

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

## **Question 5 (25 marks)**

Article 158 of the Basic Law provides as follows:

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

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

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

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

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

## **Questions:**

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

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

**(15 marks)**

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

**(10 marks)**

**END OF TEST PAPER**