

2024 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD VI: HONG KONG CONSTITUTIONAL LAW

Wednesday, 6 November 2024



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Question 1 (25 marks)

Article 2 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, adopted by the Standing Committee of the National People's Congress of the People's Republic of China ("PRC") on 30 June 2020 reads as follows:

"The provisions in Articles 1 and 12 of the Basic Law of the Hong Kong Special Administrative Region on the legal status of the Hong Kong Special Administrative Region are the fundamental provisions in the Basic Law. No institution, organisation or individual in the Region shall contravene these provisions in exercising their rights and freedoms."

This Article treats Articles 1 and 12 of the Basic Law of the Hong Kong Special Administrative Region ("BL") as "the fundamental provisions" that together define the legal status of the Hong Kong Special Administrative Region ("HKSAR") within the PRC, as follows:

"Article 1 The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China."

Article 12 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."

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

Questions:

You are a newly qualified solicitor in private practice. Your firm's client is a foreign businessman considering investing in both Hong Kong and other parts of China who, having read the above provisions, seeks your firm's advice on a number of related points. **Draft a memo for your supervising partner's approval answering the following questions raised by your client:**

- (1) **Based on the above provisions, what is the constitutional relationship between the PRC and the HKSAR?**

(5 marks)

- (2) **What is the meaning of the term "local administrative region" in Article 12 of the BL in the context of the Chinese constitutional framework?**

(5 marks)

- (3) **What are the implications of providing that the HKSAR shall "come directly under the Central People's Government" in Article 12 of the BL?**

(10 marks)

- (4) **How is the HKSAR different from other local administrative units within the PRC such as provinces, cities directly under the central government, and national autonomous regions?**

(5 marks)

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

In answering the fourth of the above questions, candidates may wish to make reference to Articles 30-31 of PRC Constitution 1982 which state as follows:

“Article 30 The administrative areas of the People’s Republic of China shall be delineated as follows:

(1) The country consists of provinces, autonomous regions and cities directly under central government jurisdiction;

...

Article 31 The state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People’s Congress.”

Question 2 (25 marks)

You have been approached by Fayke News Ltd. (“Fayke News”), an outlet specialising in political journalism in Hong Kong and the Greater Bay Area. The Fayke News team is making a documentary about the political structure in Hong Kong. In the course of their research and editorial discussions, their staff are unable to agree on whether Hong Kong is based on a “separation of powers” model or is instead an “executive-led system”.

Question:

- (1) Draft a memo for your supervising partner on the arguments for describing Hong Kong as based on a separation of powers model and the arguments for describing Hong Kong as an executive-led system. Cite relevant legal authority where appropriate.**

(15 marks)

The Fayke News documentary is broadcast on television. In the documentary, one of its journalists claims that “the Chief Executive has control over all public bodies and public officials in Hong Kong” and that “the Legislative Council and the Judiciary are subordinate and accountable to the Chief Executive”. The Chief Executive’s Office objects to the accuracy of the claims made in the Fayke News’ documentary, and the Fayke News executive team has become worried that the documentary contains factual inaccuracies about the role and powers of the Chief Executive. They are considering publishing a statement correcting any inaccurate statements which were made in the documentary, and approach you for an explanation of the limitations on the powers of the Chief Executive. In particular, they seek clarity on the limitations on the role and powers of the Chief Executive over the Legislative Council and the Judiciary.

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

Question:

- (2) Write a memo to Fayke News explaining the limitations on the role and powers of the Chief Executive over the Legislative Council and the Judiciary. Cite relevant legal authority where appropriate.**

(10 marks)

Question 3 (25 marks)

A new pandemic, dubbed “KIT-10” (the “Virus”), has caused a severe health crisis in Hong Kong, with hundreds dying as a result of complications after contracting the Virus. The scientific consensus is that the Virus is primarily transmitted by felines. Accordingly, the Legislative Council has enacted the Prevention of Disease (Emergency Powers) Ordinance of 2025 (the “Ordinance”). Section 44 of the Ordinance relevantly provides as follows:

“If the Director is satisfied that an animal present in Hong Kong is or is likely to be infected with [the Virus], or is at the risk of infection, he may take such measures as he shall in his discretion determine are necessary in the interests of public health, including ordering in writing that such animal:

- (a) be seized and impounded by the Department;*
- (b) be destroyed; or*
- (c) be quarantined in a secure facility,*

in each case on such terms as he thinks fit [...]”

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

Insofar as is relevant, section 2 of the Ordinance provides that for the purposes of the Ordinance:

“Animal means any non-human animal, including domestic animals and livestock [...]

Department means the Agriculture Fisheries and Conservation Department [...]

Director means the Director of the Department”

Anjelica Anderson (“AA”) is a cat fancier. She owns an award-winning white British Shorthair cat, called “Silver”. Silver cost AA HK\$50,000 to purchase and another HK\$50,000 to rear and train. Silver has won HK\$400,000 in prize money to date and could reasonably be expected to earn even more over the course of its lifetime at feline beauty contests. On 4 January 2025, AA received a notice (the “Notice”) from Balthazar Bau (“BB”), who is the Deputy Director of the Department, which relevantly stated as follows:

- “1. The Director has determined that Silver is likely to have come into contact with the Virus by reason of frequently attending cat beauty competitions.
2. The Director has therefore ordered that AA surrender Silver to the Department to be destroyed [i.e., euthanised] within 7 days of the date of the Notice, with a standard compensation sum of HK\$4,000 payable by the Government to AA within 28 days thereafter.
3. No further reasons were given, and the Director’s decision in the Notice was stated to be “*final*”.”

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

The Ordinance does not provide for any mechanism to appeal the Notice. AA was outraged and immediately sought legal advice. Silver is vital to her emotional well-being - indeed, she thinks of it as her child. Her psychiatrist has confirmed by way of a written opinion that she would likely suffer severe mental anguish if the cat were euthanised.

Question:

You are a first-year associate at the boutique litigation firm Dobermann & Rottweiler. Your supervising partner has asked you to draft a short internal memorandum to enable him to advise AA on whether the Notice issued by BB was lawful and, if so, whether there is any scope to challenge section 44 of the Ordinance and/or the Notice.

You should assume that the Ordinance was duly enacted and that the only provisions of the Ordinance that are relevant to your analysis have been reproduced above.

(25 marks)

Question 4 (25 marks)

In *Koo Sze Yiu & Anor v Chief Executive of the HKSAR* [2006] 3 HKLRD 455 (CFA), Bokhary PJ articulated the legal foundation for the suspension of a declaration of unconstitutionality and an order of temporary validity as follows: “... *The rule of law involves meeting the needs of law and order. It involves providing a legal system able to function effectively. In order to meet those needs and preserve that ability, it must be recognized that exceptional circumstances may call for exceptional judicial measures. Temporary validity or suspension are examples of what courts have seen as such measures.*”

In *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 (CFA), Sir Anthony Mason NPJ explained the remedial interpretation principle: “... *They are directed to the situation which arises when a statute on its true interpretation, derogates from an entrenched or statutory human right or fundamental freedom. They authorize or, more accurately, require the courts, in such a situation, to give the statutory provision an interpretation that is consistent with the protected rights, even an interpretation that is strained in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation.*”

Questions:

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

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

- (1) Explain the purpose, scope and circumstances in which the courts will suspend a declaration of unconstitutionality, or otherwise order a declaration of temporary validity.**

(15 marks)

- (2) Explain the purpose, scope and circumstances in which the courts will adopt a remedial interpretation of legislation.**

(10 marks)

Question 5 (25 marks)

The HKSAR government has decided that as a matter of policy only Chinese citizens who are permanent residents should be allowed to vote (“policy objective”). Extensive research has been conducted and it has been concluded that such a citizenship qualification would be consistent with international practice; further there would be no conflict with the International Covenant on Civil and Political Rights (“ICCPR”), Article 25 of which guarantees the right to vote only to citizens. However, there is some concern about Article 26 of the Basic Law (“BL 26”) which currently provides:

“Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for election in accordance with law.”

The government is conducting extensive public consultation, and has asked the Law Society of Hong Kong and the Hong Kong Bar Association for their views as to how to go about changing the law so as to implement the policy objective.

Question:

You are a newly qualified solicitor in a leading local law firm. Your supervising partner is a member of the Law Society’s Constitutional Affairs Committee, which is currently considering the government’s request for views. You are asked to prepare a draft briefing note for his use.

The 3 issues which you are asked to address in your briefing note, are:

- 1. Do the closing words of BL 26 (‘in accordance with law’) mean that the policy objective could be achieved simply by changing the relevant local Ordinances concerning electoral matters?**

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

2. If the government concludes that there is doubt as to whether the policy objective could be achieved simply by amending local Ordinances, could BL 26 be interpreted by the Standing Committee of the National People's Congress so as to achieve the policy objective?
3. If an amendment to BL 26 is thought to be necessary or desirable to achieve the policy objective, how could this be done?

(25 marks)

END OF TEST PAPER