
**2015 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 3 November 2015



HEAD VI: HONG KONG CONSTITUTIONAL LAW

TEST PAPER

3 November 2015

Instructions to Candidates:

1. The duration of the examination is 3 hours and 30 minutes.
2. This is an open-book examination.
3. There are FIVE questions in this paper.

ANSWER ANY FOUR QUESTIONS ONLY.

4. You must write your answers to each question in a separate answer book.
5. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER:
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS THAT YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.
6. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.
7. An examiner will be present for the first 30 minutes of the examination. Any questions relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.
8. Do not take either this question paper or any answer books with you when you leave the examination room.

2015 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

Facts

You are a newly admitted Hong Kong solicitor practising in an international law firm in Hong Kong. Your firm acts for Zing SA ("Zing"), a major European clothing retailer which intends to enter the Hong Kong market. Zing already has branches in 9 jurisdictions in Europe and North America, and this will be its first move into Asia.

The senior partner of your firm has scheduled a meeting with Zing's in-house legal counsel to discuss issues raised by the latter in relation to setting up Zing's business in Hong Kong. The senior partner has asked you to prepare background briefing notes on these issues, for her use. The issues are:

- (1) In the Hong Kong SAR, as part of China, will it be necessary for Zing to comply with different levels of regulatory regime as would be the case in the United States (federal, state and municipal) or the European Union (EU, national and local)? In matters such as employment, consumer protection and product liability, will it be necessary to seek advice on Mainland law as well as Hong Kong law?
- (2) In the event of a commercial dispute arising locally, would it be resolved in Hong Kong or the Mainland? Could a Hong Kong judgment be appealed to a Mainland tribunal? Are the Hong Kong courts subject to any political directives or other influence from outside bodies in Hong Kong or the Mainland?

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

Question:

Prepare background briefing notes for the senior partner to use in the meeting with Zing's in-house legal counsel, providing guidance on how points (1) and (2) above should be answered, together with explanations referring to relevant constitutional principles, laws and regulations.

(Point (1) – 15 marks)

(Point (2) – 10 marks)

Question 2 (25 marks)

Facts

You are a newly admitted Hong Kong solicitor in the banking and finance department of a Hong Kong firm of solicitors. Your firm acts for the Hong Kong branch of ABC Bank ("**Bank**"), a world-wide bank headquartered in London. A senior executive recently left employment with the Hong Kong branch of the Bank, and has now commenced proceedings against the Bank in the Labour Tribunal claiming millions of dollars in compensation. The ex-senior executive claims that she was wrongfully denied promotion prospects, amounting to constructive dismissal by the Bank. She also claims bonuses which were allegedly earned but not paid.

The allegations made by the ex-senior executive are flatly denied by the Bank. The Bank has instructed your firm to represent it in the employment dispute, and has made it clear that it intends to fight to the finish because it fears that it could face similar claims from other former employees and does not wish to set a precedent.

You have advised the Bank that although your firm can provide general legal advice and assistance in the matter, it cannot appear or instruct counsel to appear before the Tribunal, because by section 23(2) of the Labour Tribunal Ordinance (Cap 25) barristers and solicitors do not have the right of audience on behalf of clients. You have further advised the Bank that by section 23(1)(d) of Cap 25, the Bank will be required to be represented at hearings before the Tribunal by one of its officers or employees.

The Bank is unhappy with the prospect of having to be represented by one of its officers or employees, all of whom are busy and do not have the time or skills to act as the bank's advocate in Tribunal proceedings. The Bank asks your firm whether there is anything that can be done to get around the restrictions on legal representation set out in Cap 25.

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

The senior partner of your firm is aware that under Article 35 of the HKSAR's Basic Law there is a right of choice of lawyers for representation in the courts, and wonders whether this could be a basis to challenge the constitutionality of the relevant parts of section 23 of Cap 25. She recalls that under s 10(2) of the Labour Tribunal Ordinance, proceedings may be transferred to the District Court or the Court of First Instance and she wonders if this may have some bearing on the matter. She is also aware of Article 81 of the Basic Law which preserves the judicial system previously practised in Hong Kong, and notes that the prohibition on legal representation in the Labour Tribunal existed during the colonial era. The senior partner is minded to recommend that the Bank seeks counsel's advice on these matters. However, she knows that the Bank would not authorise such expenditure without your firm's advice that there is a sound basis for sending the matter to counsel.

Question:

Prepare a note for the senior partner on the issues she has in mind, and consider whether there is a sound basis to recommend that the Bank obtains counsel's advice on a possible constitutional challenge.

(25 marks)

Question 3 (25 marks)

You are a solicitor in private practice. Your client, Wong Tak Ming ("**Wong**") has been charged with multiple counts of contravention of provisions in the Import and Export Ordinance (Cap 60) which restrict the export of powdered milk formula for consumption by infants and young children under 36 months. The case is listed to be heard in Eastern Magistrates' Court before an expatriate magistrate who does not understand Chinese.

Wong, who plans to give evidence in Cantonese, wishes his case to be heard by a judge who can understand his evidence without the use of an interpreter. He insists he has a constitutional right to have his case heard in Chinese under Article 9 of the Basic Law, which he interprets as giving Chinese a superior status over English as the primary official language of the HKSAR.

Article 9 states as follows: "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region ("**HKSAR**")."

You are instructed to seek leave to apply for judicial review to the Court of First Instance to challenge the constitutionality of provisions in sections 3(1) and 3(2) of the Official Languages Ordinance (Cap 5) by reason of inconsistency with Article 9 of the Basic Law.

Sections 3(1) and 3(2) state as follows:

"(1) The English and Chinese languages are declared to be the official languages of Hong Kong for the purposes of communication between the Government or any public officer and members of the public and for court proceedings.

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

- (2) The official languages possess equal status and, subject to the provisions of this Ordinance, enjoy equality of use for the purposes set out in subsection (1).”

Questions:

- (1) **What advice would you give to Wong as to the jurisdiction of the courts of the HKSAR to consider a challenge to the constitutionality of provisions in an ordinance of the HKSAR by reason of inconsistency with a provision in the Basic Law?**

(6 marks)

- (2) **What approach do the courts of the HKSAR adopt in interpreting provisions of the Basic Law? Applying this approach, advise Wong as to the issues the court would be likely to consider in deciding whether Article 9 of the Basic Law affords Chinese a superior status over English as the primary official language of the HKSAR.**

(12 marks)

- (3) After the conclusion of the application for leave to apply for judicial review in the Court of First Instance, Wong’s trial for alleged breach of the Import and Export Ordinance (Cap 60) begins in Eastern Magistrates' Court.

Your attention is drawn to an extract from a 10 August 1996 report by the Preparatory Committee, a body established by the National People’s Congress to prepare for China’s resumption of sovereignty over the HKSAR. This states that: “It is the purpose of Article 115 of the Basic Law that the policy of free trade should prohibit any restrictions on the export of foodstuffs from the HKSAR to the Mainland.”

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

Article 115 of the Basic Law states as follows: “The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital”.

Wong wishes to use this extract from the Preparatory Committee report to challenge the constitutionality of the restrictions on the export of powdered milk formula in the Import and Export Ordinance (Cap 60) in relation to exports to the Mainland.

Based on relevant case authority, advise Wong as to what approach the court is likely to adopt in using this extract from the 10 August 1996 report as an aid to interpreting Article 115 of the Basic Law.

(7 marks)

Question 4 (25 marks)

Deng Xiaoping has said the following on separation of powers in Hong Kong ("HK"):

“Hong Kong's system of government should not be completely Westernized; no Western system can be copied *in toto*. For a century and a half Hong Kong has been operating under a system different from those of Great Britain and the United States. I am afraid it would not be appropriate for its system to be a total copy of theirs with, for example, the separation of the three powers and a British or American parliamentary system.”

But after the change of sovereignty, courts in HK have expressed consistently the view that the Basic Law has followed the doctrine of separation of powers. For example, in the case of *Lau Cheong v. HKSAR* (2002) 5 HKCFAR 415, the CFA has said the following:

“The Basic Law enshrines the principle that there must be a separation of powers as between the executive, the legislature and the judiciary”.

Questions:

Discuss the following related issues:

- (1) Should the courts in HK after 1997 adopt the Chinese approach or its former approach (before 1997) towards the doctrine of separation of powers? Why?**

(15 marks)

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

- (2) Assuming the Basic Law enshrines the doctrine of separation of powers and that the content of section 67C of the Criminal Procedure Ordinance (Cap 221) is as stated below, what would be the impact of the Basic Law upon the authority granted to the Chief Executive under section 67C?

(10 marks)

(Section 67C of Criminal Procedure Ordinance (Cap 221) (hypothetically) provides:

"...

- (2) within 6 months after the commencement of this section, the Chief Justice must, after taking into account any representations made under subsection (3), submit to the Chief Executive in respect of each prisoner to whom this section applies a recommendation specifying a minimum term that the prisoner should serve in relation to the offence for which the prisoner was sentenced to imprisonment or is detained at Executive discretion and the recommendation should include any special considerations or circumstances to be taken into account in any future review.
- (3) Before making a recommendation under subsection (2), the Chief Justice must
-
- (a) give the prisoner an opportunity to make written representations to the Chief Justice for the Chief Justice to take into account in making the recommendation; and
- (b) as far as it is practicable to do so, consult with the judge who presided at the trial of the relevant offence.

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

- (4) As soon as practicable after receiving a recommendation under subsection (2), the Chief Executive must determine a minimum term that the prisoner must serve for the offence, taking into account the recommendation of the Chief Justice and any representations made under subsection (5).

- (5) The Chief Executive must not make a determination under subsection (4) in respect of a prisoner without having -
 - (a) provided the prisoner with a copy of the Chief Justice's recommendation in respect of the prisoner's sentence or detention; and
 - (b) given the prisoner an opportunity to make written representations to the Chief Executive with respect to that recommendation.")

Question 5 (25 marks)

‘In some cases involving fundamental rights such as freedom of expression or freedom of peaceful assembly, or rights bearing on criminal liability such as the presumption of innocence, the Court has regarded the restriction as disproportionate unless it goes no further than necessary to achieve the legitimate objective in question ... However, as the Chief Justice noted in *Fok Chun Wah v Hospital Authority*, " ... it would not usually be within the province of the courts to adjudicate on the merits or demerits of government socio-economic policies." per Ribeiro PJ in *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 969.

Question:

In the light of the above statement and relevant legal authorities, explain the legal basis of and approaches to constitutional judicial review of legislation and administrative action in the Hong Kong Special Administrative Region.

(25 marks)

END OF TEST PAPER