

**2016 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 8 November 2016



HEAD VI: HONG KONG CONSTITUTIONAL LAW

TEST PAPER

8 November 2016

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.

2016 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

Your client operates a cross-boundary coach service, offering dozens of journeys to various destinations in Guangdong province each day. Its main competitive advantage is that its service is quicker than existing rail links.

Your client is concerned that its business will be harmed by competition from the proposed express rail link from Kowloon West to the Mainland. The express rail link will be faster, travelling at high speed, and would offer passengers the convenience of being able to clear both Hong Kong and Mainland immigration and customs before departure. Your client is aware from newspapers that some politicians oppose the co-location of Mainland immigration and customs officers within Hong Kong on the ground it would be unconstitutional. Your client seeks your advice on this constitutional issue, and what steps could be taken to protect its business.

Question:

- (1) **With reference to the relevant provisions of the Basic Law, advise your client whether Mainland immigration and customs laws may be applied in the Hong Kong Special Administrative Region, and, assuming the answer is negative, how they might be made to apply in a constitutionally compliant manner.**

(15 marks)

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

After considering your advice, your client instructs you to write to the Secretary for Justice opposing the proposed co-location arrangement. In your letter you assert that the proposed arrangement would be unconstitutional under the terms of the Basic Law. The reply you receive rejects your assertion of unconstitutionality. Further it says that the co-location arrangement would not, in any event, involve application of Mainland laws in Hong Kong. Any application of Mainland laws, says the reply, occurs at an earlier stage when the traveller applies for a home return permit or visa; all the Mainland immigration officer at Kowloon West station will do is to verify that the traveller already has a valid permit or visa. The reply says that a firm decision has now been taken to implement the co-location arrangement. Your client is not satisfied with this response.

Question:

- (2) **Outline for your client what remedy to seek and the procedures which would need to be followed in order to challenge the constitutionality of the proposed co-location arrangement in court.**

(10 marks)

Question 2 (25 marks)

The Small House Policy (the "**Policy**") was introduced in 1972 and entitles male indigenous villagers aged 18 or above, who are descended through the male line from one of the recognised villages in the New Territories, to apply to build a small house once in their lifetime. This can either be done by applying for a free building licence to build a small house on their land at nil premium, or a private treaty grant of Government land at a concessionary premium.

Hung San is a male indigenous villager within the meaning of the Policy. His daughter, Yin Ha, decides to move out of the family home, and to apply for a free building licence to build a small house on family land in one of the recognised villages in the New Territories. Upon applying to the District Lands Officer, Yin Ha receives notice that her application is rejected on the basis that the Policy applies only to male indigenous villagers, and that she is ineligible on the basis of her sex (the "**Decision**"). Yin Ha applies for judicial review of the Policy and the Decision. She avers that the Policy is in violation of Article 25 of the Basic Law, and that the Decision is in violation of section 5(1)(a) of the Sex Discrimination Ordinance (cap. 480).

Article 25 of the Basic Law provides:

"All Hong Kong residents shall be equal before the law."

Section 5(1)(a) of the Sex Discrimination Ordinance (cap. 480) provides:

"A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if on the ground of her sex he treats her less favourably than he treats or would treat a man...".

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

The applications are heard together before a judge of the Court of First Instance, to whom you are a judicial assistant. The Government of the Hong Kong Special Administrative Region and the District Lands Officer aver that the Policy and the Decision are lawful because of (i) Article 40 of the Basic Law and (ii) the following (fictitious) extract from a report by the Preparatory Committee, a body established by the National People's Congress to prepare for China's resumption of sovereignty over Hong Kong, dated 15th May 1996:

"Article 40 of the Basic Law is intended to protect the rights, interests and way of life of indigenous inhabitants of the "New Territories", even where these conflict with other values. In the event of a conflict, the rights, interests and way of life of indigenous inhabitants of the "New Territories" should be prioritised over other values."

Article 40 of the Basic Law provides:

"The lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region."

Questions:

Prepare a background memo for the judge who is hearing the case. He asks you to address the following points:

- (1) Whether and how section 5(1)(a) of the Sex Discrimination Ordinance (cap. 480) might affect the rights and interests protected by Article 40 of the Basic Law; and**

(9 marks)

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

(2) To what extent the extract from the Preparatory Committee's report might affect the interpretation of Article 40 of the Basic Law; and

(7 marks)

(3) How the Basic Law should be interpreted if there is a potential conflict between Articles 25 and 40 of the Basic Law?

(9 marks)

Question 3 (25 marks)

You are a newly admitted Hong Kong solicitor practising in a law firm specialising in human rights law. Your firm acts for X and Y.

X arrived in Hong Kong in 2012 to file a claim under the Convention Against Torture ("CAT"), on the basis that his return to his home country would put him at a real risk of being tortured. Y arrived from Mainland China in 2012 on a "one-way permit", and thus has the right to reside in Hong Kong and is eligible to apply for permanent residency after ordinarily residing in the territory for a continuous period of seven years. X and Y entered into a relationship and subsequently married in 2012, having a child in 2013.

In order to obtain affordable housing for her new family to live in, Y applied for public housing in 2013 but was informed that she was ineligible as she did not satisfy the Housing Authority's policy that a resident must have resided in Hong Kong for seven years in order to be eligible to be considered for public housing.

To support his new family, X worked illegally in Hong Kong from 2013 until he was prosecuted and convicted for doing so in 2014, whereby he received a 6-month suspended prison sentence. X's CAT claim was rejected in 2014 on the basis that there was no real risk of him being tortured if he was to be returned to his home country. X has now received from the Immigration Department ("ID") a notice of deportation.

X applied to the ID for a dependant visa, to be Y's dependant. However, this was rejected on the basis that he had a known record of detriment for working illegally between 2013-2014.

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

Questions:

- (1) What advice would you give to X and Y with respect to a possible legal challenge under the Basic Law and Hong Kong Bill of Rights Ordinance (Cap. 383) to the ID's notice of X's deportation from Hong Kong?

(15 marks)

- (2) Based on relevant legal authority, advise Y as to a possible basis to challenge the seven-year residence requirement for public housing eligibility.

(10 marks)

[Note: You are not required to advise on any procedural steps which would need to be adopted in bringing any possible legal challenges.]

Question 4 (25 marks)

Wong is a serving civil servant in the Government of the Hong Kong Special Administrative Region whose close connections with Chan, a prominent property developer, have led to accusations of a conflict of interest in the Hong Kong media. The Legislative Council decides to establish a Select Committee, comprising a small group of legislators, to conduct an investigation into these allegations.

Wong and Chan, who have both been summoned by the Select Committee to attend one of its meetings, question the legal basis for the issuing of such summonses by the Select Committee. The Legal Adviser to the Select Committee responds that the summonses have been issued in accordance with the Legislative Council's powers under Section 9 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and Article 73 of the Basic Law.

Section 9 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) provides:

- "(1) The Council or a standing committee thereof may, subject to sections 13 and 14, order any person to attend before the Council or before such committee and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person.
- (2) The powers conferred by subsection (1) on a standing committee may be exercised by any other committee which is specially authorized by a resolution of the Council to exercise such powers in respect of any matter or question specified in the resolution."

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

[Note: Sections 13 and 14 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) are not relevant to the issues raised in this question.]

Article 73 of the Basic Law provides in part:

"The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

...

- (5) To raise questions on the work of the government;
- (6) To debate any issue concerning public interests;
- (10) To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence."

Question:

- (1) **Wong and Chan engage a team of lawyers to explore all legal options that might enable them to avoid appearing before the Select Committee, and you are given the specific task of advising on certain provisions in the Basic Law that might assist in this respect. By reference only to possible interpretations in Hong Kong of the above sections of Article 73, and to any other relevant provisions in Chapter IV of the Basic Law, advise on any options this may offer firstly Wong and secondly Chan in resisting the summonses issued by the Select Committee. In your advice, you should also offer some assessment of the likely prospects for success.**

(10 marks)

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

Lee is a legislator who strongly opposes a provision in a bill to amend the Societies Ordinance (Cap. 151) ("**Ordinance**") currently being debated in the Legislative Council, which would add the words "ordre public" to the list of permissible grounds listed in Section 8(1)(a) of the Ordinance for recommending the making of an order prohibiting the operation or continued operation of a society or branch thereof.

Section 8(1)(a) of the Ordinance currently provides as follows:

- "(1) The Societies Officer may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of the society or the branch -
- (a) if he reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others;"

Lee, who fears the inclusion of "ordre public" would breach the Basic Law, proposes 100 amendments to this provision in the bill, requiring that the Ordinance must be applied in a manner consistent with various articles in the Basic Law which are named in these amendments. However the Legislative Council President prevents 99 of these amendments from being tabled in the Legislative Council, ruling that it is in the interests of the orderly, efficient and fair disposition of the Legislative Council's business that no member be permitted to table more than one amendment to any particular provision. Citing the same reasoning, the Legislative Council President also rules that a 30-minute time limit will be imposed on all debate on the one amendment which Lee is permitted to table.

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

Question:

- (2) Lee seeks your advice on the most effective strategy to adopt in bringing an action for leave to seek judicial review. Citing relevant case law, advise Lee both on the possibility of bringing a successful action challenging the rulings of the Legislative Council President and, if the bill is enacted, a successful action in relation to the addition of the words "ordre public" to the Ordinance.

[Note: You may wish to consider the issue of standing as part of your answer, but are not required to advise on any procedural steps which would need to be adopted in bringing an action for leave to seek judicial review.]

(15 marks)

Question 5 (25 marks)

New Territories East returning officer, Cora Ho, disqualified Hong Kong Indigenous spokesman Edward Leung ("**Leung**") on the ground that she did not trust Leung genuinely changed his previous stance for Hong Kong independence. While Secretary for Justice, Rimsky Yuen, said that such a decision has a legal basis, a group of lawyers said in a joint statement that the Legislative Council Ordinance (Cap. 542) does not give the returning officer any power either to inquire into the genuineness of Leung's declaration or to make a subjective decision to disqualify Leung "without following any due process on the purported ground that the candidate will not genuinely uphold the Basic Law". Leung said that he would definitely challenge the decision before court. Concern has been expressed that an interpretation of the Basic Law by the Standing Committee of the National People's Congress ("**NPCSC**") may follow if the PRC Government is not satisfied with the court's decision.

Section 2 of the Legislative Council Ordinance (Cap. 542) provides:

"The purpose of this Ordinance is to give effect to the provisions of the Basic Law relating to the Legislative Council."

Article 23 of the Basic Law provides:

"The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

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

Article 48 of the Basic Law provides in part that:

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

...

(4) To decide on government policies and to issue executive orders;

..."

Questions:

(1) Advise Leung whether courts in Hong Kong enjoy authority of final adjudication over such disqualification controversy and whether the NPCSC can give an interpretation of the relevant provisions of the Basic Law.

(15 marks)

(2) Given that several local political groups have advocated Hong Kong independence and no local Article 23 legislation has been enacted, advise the Government of the Hong Kong Special Administrative Region whether the Chief Executive can issue an executive order under Article 48(4) of the Basic Law to fill in that legislative gap.

(10 marks)

END OF TEST PAPER