

**2017 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Thursday, 26 October 2017



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Question 1 (25 marks)

A senior member of the PRC Government is on an official visit to Hong Kong. The event generates strong emotions among the local community, with a number of protestors gathering in Central. Some of the protestors carry pro-democracy banners and chant slogans about the state of democracy in Hong Kong and "Mainland interference". Other protestors carry "pro-Beijing" banners and chant slogans about local groups undermining national unity. One protestor (Brian), initially part of the "pro-Beijing" group of protestors, is particularly enthusiastic about national unity being upheld. He breaks free from the group and becomes more boisterous. The police warn Brian to calm down, however he ignores police warnings and begins to loudly make claims that, by failing to arrest the pro-democracy protestors, the police are "allowing separatists to undermine national unity". At this stage, the police arrest Brian for committing a public order offence.

Brian claims that the arrest violates his constitutional rights to freedom of speech, assembly and demonstration. He also claims that his arrest is unlawful and unconstitutional, as he was merely promoting the concept of the Hong Kong Special Administrative Region being an inalienable part of the PRC, and pointing out that the police had a duty to prevent "separatists" doing or saying anything which undermined national unity. He therefore claims that he was "forcing the police to uphold their obligation to national unity".

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

Brian's constitutional challenge is rejected by the courts. He appeals unsuccessfully to the Court of Final Appeal, which disposes of Brian's case without seeking an interpretation of any provision in the Basic Law from the National People's Congress Standing Committee ("NPCSC"). Brian is furious and states that he wants to "appeal to the NPCSC". He also states that the Court of Final Appeal was under a constitutional obligation to seek an interpretation of the Basic Law on freedom of speech, assembly and demonstration as they relate to a protestor who was, as Brian claimed, "forcing the police to uphold their obligation to national unity".

Questions:

- (1) Can Brian appeal the case from the Court of Final Appeal to the NPCSC? Explain your answer with reference to the Sino-British Joint Declaration and the Basic Law.**

(10 marks)

- (2) Could a feasible argument be made that the Court of Final Appeal should have sought an interpretation of one or more provisions of the Basic Law from the NPCSC in this case? Explain your answer.**

(15 marks)

Question 2 (25 marks)

Your client is the employer of a foreign domestic helper ("FDH"). As part of the process of obtaining immigration clearance for the FDH to work in Hong Kong, your client and the FDH were each required to sign:

- (a) a standard form contract of employment providing *inter alia* that the FDH will 'work and reside in the Employer's residence ...'; and
- (b) a standard form written undertaking to the Hong Kong Special Administrative Region ("HKSAR") government that the FDH would reside only in the residence stated in the contract.

There is no legislative basis to the above forms. They are internal administrative forms used by the Director of Immigration ("DOI") in processing applications for FDHs to live and work in Hong Kong. The DOI's legal power in such cases is the general discretionary power under the Immigration Ordinance (Cap. 115) ("IO") to permit non-Hong Kong permanent residents to live and work in the HKSAR.

Your client and the FDH both prefer a live-out arrangement. As a result, the FDH lives in a room with her husband in a shared flat in another part of the city. Your client has all along been providing a subsidy to cover the FDH's share of the flat rental. Each workday morning the FDH travels by bus to your client's home to report for work, and each evening she returns home to the shared flat.

Your client and the FDH have both been arrested and charged by the Immigration Department. It is alleged that each of them is guilty of making a false statement to an immigration officer, contrary to section 42(1)(b) of the IO. The particulars of the offence specify that the alleged false statement is the standard form written undertaking.

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

Article 12(1) of the International Covenant on Civil and Political Rights ("ICCPR") provides:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Similarly, article 8(1) of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO") provides:

Everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence.

Your client and the FDH have both been released on bail. They have been summoned to appear before a Magistrate in March 2018. Your client is willing to admit the facts on which the charge against him is based, but wishes to plead not guilty and defend the charge on the basis of the rights guaranteed by the ICCPR and HKBORO, as set out above.

Questions:

- (1) In which forum should your client's legal defence be raised? Can it be raised before the Magistrate, or would it be more appropriate to apply for judicial review before the trial?**

(10 marks)

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

(2) Advise your client, with full explanation, of the chances of success of his proposed legal defence based on the provisions of the ICCPR and HKBORO cited above.

(15 marks)

[Note: Apart from advising on the appropriate forum for your client's legal defence, you are not required to advise on any procedural steps in relation to this court case.]

Question 3 (25 marks)

The Government of the Hong Kong Special Administrative Region had long planned to extend the South East New Territories ("SENT") Landfill in Tseung Kwan O into the Clear Water Bay Country Park ("CWBCP"). In 2010, the Environmental Protection Department commissioned a study on the potential to extend the SENT Landfill. In 2015, "A Policy Framework for the Management of Municipal Solid Waste (2015-2020)" was issued and it was estimated that the SENT Landfill would be exhausted in 6 to 10 years.

As the proposed extension would encroach upon the CWBCP, the Administration invoked s.15 of the Country Parks Ordinance (Cap. 208) ("Ordinance") to replace the original approved map of the CWBCP with a new map of the CWBCP which excluded the area designated for the extension of the SENT Landfill from the new boundaries for the CWBCP.

The replacement of the original approved map of the CWBCP with a new map of the CWBCP followed the procedures laid down in ss. 13-14 of the Ordinance:

- 1) The Chief Executive ("CE") in Council's approval of a draft map under s.13(1);
- 2) Its signature by the Country and Marine Parks Authority and deposit in the Land Registry under s.13(4);
- 3) The notification by Gazette of the deposit of the approved map under s.13(5);
- 4) The CE's designation of the area shown in that approved map to be a country park by order in the Gazette under s.14.

Upon completion of these procedures, the Country Parks (Designation) (Consolidation) (Amendment) Order 2017 ("Order") was made by the CE on 31 March 2018. It was supposed to come into operation on 1 November 2018.

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

The Subcommittee on Country Parks (Designation) (Consolidation) (Amendment) Order 2018 ("Subcommittee") was formed to consider the Order, which was tabled before the Legislative Council ("Legco") in April 2018. Meanwhile, objections against the extension were raised by different stakeholders. These culminated in a cross-party plan in Legco to move a resolution to repeal the Order.

The Government insisted that Legco does not have the constitutional power to repeal an Order properly made under the procedures laid down in the Ordinance. Nevertheless, the Legco President ruled that Legco members do have the power to move the proposed resolution and, on 13 June 2018, they overwhelmingly passed a resolution repealing the Order.

The CE and her administration believe that the Legco President's ruling is incorrect, and that Legco has acted ultra vires in passing this resolution. They have decided to bring an action for leave to seek judicial review in relation to both the Legco President's ruling and the passing of the 13 June 2018 resolution.

[Sections 13-15 of the Country Parks Ordinance (Cap. 208) state as follows:

Section 13. Power of Chief Executive in Council upon submission of draft map

- (1) Upon submission of a draft map under section 12, the Chief Executive in Council shall —
 - (a) approve the draft map;
 - (b) refuse to approve it; or
 - (c) refer it to the Authority for further consideration and amendment.

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- (2) Where the Chief Executive in Council refuses to approve a draft map under subsection (1)(b), the Authority shall as soon as possible after such refusal give notice in the Gazette of such refusal.
- (3) The Chief Executive in Council may by order published in the Gazette correct any omission from or error in any map approved by him.
- (4) Every map approved by the Chief Executive in Council shall be signed by the Authority and shall be deposited in the Land Registry.
- (5) The deposit of maps under subsection (4) shall be notified in the Gazette.
- (6) The Authority shall supply a copy of an approved map to any person upon payment of such fee as the Authority may determine.

Section 14. Designation of country parks

Where the Chief Executive in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive shall, by order in the Gazette, designate the area shown in the approved map to be a country park.

Section 15. Replacement or amendment of approved maps

- (1) The Chief Executive in Council may refer any map approved by him under section 13 to the Authority for replacement by a new map or for amendment.
- (2) Upon any reference under subsection (1), sections 8 to 14 shall apply in respect of a new map in replacement of the map referred to or any amendment to the map referred in like manner as they applied to the map it replaces or amends;

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

and where the reference is in respect of an amendment the word "map" (地圖) in sections 8 to 14 shall be construed as referring to the map showing the amendment.

- (3) A map referred to the Authority shall be replaced by the new approved map or read as one with any approved amendment as the case may be.
- (4) The Land Registrar shall endorse accordingly the map deposited under section 13 which has been replaced or amended and shall cause the copies of the maps deposited in the Land Registry to be similarly endorsed.]

Questions:

You are instructed by the Legco President to advise on:

- (1) the proper constitutional arrangement and relationship between the different branches of government under the Basic Law; and**

(10 marks)

- (2) the appropriate legal principles already tested in case law that can be deployed to defend Legco against a court action concerning its internal procedures, and whether these principles would be applicable in any legal action brought concerning the Legco President's ruling and this resolution.**

(15 marks)

[Note: You are not required to advise on any procedural steps in relation to bringing an action for leave to seek judicial review.]

Question 4 (25 marks)

In the case of *Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others* (HCAL31/2015), Ms. Leung sought to challenge three decisions of the Government of the Hong Kong Special Administrative Region ("HKSAR"): (a) the decision to commence public consultation on the method of selecting the Chief Executive ("CE") of Hong Kong in the form of the consultation document ("the Consultation Document") issued on 7 January 2015; (b) the decision to issue the Consultation Document itself; and (c) the decision to issue the Consultation Report and Proposals on the "Method for Selecting the CE by Universal Suffrage" dated 22 April 2015 ("the Consultation Report and Proposals"). She failed to get leave to seek judicial review.

Ms. Leung has two queries. The first is about an alleged inconsistency between the wording of Article 7 of Annex I to the Basic Law and a 2004 Interpretation of this provision in the Basic Law issued by the National People's Congress Standing Committee ("the NPCSC").

Article 7 of Annex I provides:

"If there is a need to amend the method for selecting the CEs for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the CE, and they shall be reported to the NPCSC for approval."

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The relevant section of the 2004 Interpretation issued by the NPCSC states:

"3 ... The CE of the HKSAR shall make a report to the [NPCSC] as regards whether there is a need to make an amendment; the [NPCSC] shall, in accordance with the provisions of Articles 45 and 68 of the [Basic Law], make a determination in light of the actual situation in [Hong Kong] and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the method for selecting the CE and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the HKSAR into the Legislative Council."

Article 7 of Annex I contains three steps for amending the method for selecting the CE, while the 2004 Interpretation has added two additional steps. There seems to her to be an obvious inconsistency between the two.

Ms. Leung's second query relates to the constitutionality of provisions in the 31 August 2014 Decision issued by the NPCSC ("the 8-31 Decision") on issues relating to the proposed introduction of universal suffrage for the selection of the CE. In her failed application for leave to seek judicial review, Ms. Leung's counsel made the following submission:

"Pursuant to the 2004 Interpretation, after receiving the CE's report submitted under step 1 in recommending the need to amend the method for selecting the CE, the NPCSC can only under step 2 decide whether or not to confirm that there is a need to amend the said method. It cannot, in confirming the need to amend, also decide on the "contents" of the amendments, that is, what the proposed amendments or the terms of the amendments should be. This is so as in the 2004 Interpretation, it is stated (in its

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original Chinese text) that the CE shall submit the report for the NPCSC to (in accordance with Basic Law 45 and 68 and in light of the actual situations of the HKSAR and in accordance with the principles of orderly and gradual progress) "確定". The Chinese words "確定" can mean only "confirm" or not alone but nothing else."

Ms. Leung is of the view that the argument advanced by her counsel may be used to question the constitutionality of the 8-31 Decision. She also believes that, based on the differing status accorded to various parts of the NPCSC's 1999 Interpretation of the Basic Law by the Court of Final Appeal in *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211, it can be argued that some parts of the 8-31 Decision do not have binding effect.

[The relevant parts of the 8-31 Decision state as follows:

At Paragraph I: "Starting from 2017, the selection of the CE of the HKSAR may be implemented by the method of universal suffrage";

At Paragraph II: "When the selection of the CE of the HKSAR is implemented by the method of universal suffrage:

- (i) A broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth CE.

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- (ii) The nominating committee shall nominate two to three candidates for the office of CE in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee.

...”]

Questions:

Prepare an advice on the following issues:

- (1) **The differences between the interpretative approaches adopted by Hong Kong courts and the NPCSC;**
(5 marks)
- (2) **Whether Ms. Leung has an arguable case on the unconstitutionality of the 2004 Interpretation by the NPCSC;**
(10 marks)
- (3) **Whether, as a Decision of the NPCSC, the 8-31 Decision is reviewable by the courts, with reference to relevant case law.**
(10 marks)

Question 5 (25 marks)

X and Y have been in a long-term same sex relationship. X was born in Hong Kong and holds permanent residency, whereas Y is a British national and resident. Following the introduction of legislation by the UK parliament recognising same-sex marriages [Marriage (Same Sex Couples) Act 2013], X and Y entered into a marriage in the UK.

X and Y have been living in the UK for a long period of time but decided that they wanted to permanently relocate to Hong Kong. To do so, Y required a visa. The dependant visa policy provides that the Immigration Department will consider applications from those dependants who are either the (i) spouse, (ii) a child, or (iii) parent over 60, of the sponsor. Y therefore applied for a dependant visa on the basis that he was X's spouse.

The Director of Immigration ("Director") refused the dependant visa on the ground that Y was not X's "spouse". The Director followed the definition of "spouse" adopted in Hong Kong in Section 40 of the Marriage Ordinance (Cap. 181):

- (1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.
- (2) The expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others.

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

Y wants to challenge the definition of marriage in Section 40 of the Marriage Ordinance and the Director's construction of "spouse" in the dependant visa policy.

Questions:

Prepare a memorandum for Y on the following:

(1) Whether Y, as a non-resident, is able to challenge the constitutionality of Section 40 of the Marriage Ordinance (Cap. 181) and the Director's construction of "spouse" in the dependant visa policy.

(5 marks)

(2) The Executive may argue that same sex marriage is a sensitive issue which should only be recognised once there is enough societal consensus in Hong Kong. Should the court therefore apply a "margin of appreciation" to the Legislative Council and Executive on this issue?

(10 marks)

(3) What advice would you give to Y with respect to a possible legal challenge to Section 40 of the Marriage Ordinance (Cap. 181) under the Basic Law and Hong Kong Bill of Rights Ordinance (Cap. 383).

(10 marks)

[Note: You are not required to include in your answer details of the procedural steps in relation to a possible legal challenge.]

END OF TEST PAPER