

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2021 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, 2nd edition, 2019);
- Johannes Chan SC (Hon) & C.L. Lim, *Law of the Hong Kong Constitution* (Sweet & Maxwell Asia, 2nd edition, 2015);
- Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (HKU Press, 2nd edition, 1999);
- Danny Gittings, *Introduction to the Hong Kong Basic Law* (HKU Press, 2nd 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, 2nd 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 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 2018, 2019 and 2020 Examinations

OLQE Examiners' Comments 2018

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by all 144 candidates who sat the exam. It also had the highest pass rate of any question, at 89%.

The question was divided into three parts and required candidates to write a briefing note for a group of overseas clients who are about to pay their first visit to Hong Kong and seek your advice on Hong Kong's status with the People's Republic of China.

Answers were generally adequate and most achieved a pass mark. However there were very few really good answers. The main problem was that many candidates had a rather rough and superficial understanding of the issues involved and were unable to answer the three parts of the question in a targeted way.

In relation to part 1 of the question on the nature of the structure of the Chinese state (which carried 5 marks), an alarmingly large number of candidates failed to mention that China is a unitary state. In relation to part 2 of the question (which carried 12 marks), many were not well aware of the division of powers between the central authorities and the HKSAR under One Country Two Systems, and resorted to guesswork. In relation to part 3 of the question which required two specific examples of the exercise of powers by the central authorities to intervene in the running of the HKSAR (which carried 8 marks), many failed to read the question properly and cited only one such example (usually interpretation of the Hong Kong Basic Law).

In future, candidates would be advised to better prepare for questions in this area and to read such questions more carefully.

Question 2:

This question was the second most popular, being attempted by 130 candidates. However it had the lowest pass rate, at 48.5%.

The question was generally modelled on the Legislative Council oath-taking controversy and the cases of *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 144 and *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 417.

In relation to part (1) of the question (which carried 15 marks), a considerable number of candidates gave general commentary on the power of the NPCSC to issue interpretations. Some included in that commentary observations on how that power may or may not represent a threat to the separation of powers and the rule of law in general. Relatively few candidates answered the part of the question referring to the issuing of such an interpretation "before judgment is given in the second set of judicial review proceedings", which raised the important issue of the timing of

NPCSC interpretations, and the potential impact of their timing on the separation of powers and the rule of law. Some candidates identified parallels with the Legislative Council oath-taking controversy, though many candidates did not which was surprising given its constitutional significance.

In relation to part (2) of the question (which carried 10 marks), this part generally appeared to be better answered, though many candidates did not fully answer the question resulting in loss of marks. Some candidates gave a balanced answer, though did not offer sufficient detail, analysis or context which could attract the full range of marks on offer. The case of *Chief Executive of HKSAR v President of the Legislative Council* [2016] 6 HKC 417 was again relevant, though few candidates recognised this.

Question 3

This question was relatively popular, being attempted by 120 candidates. It also had a relatively high pass rate of 73%.

This was a very practical question concerning the right to trial without delay in the context of a criminal case. The facts posited a client who had been in custody for 4 years waiting trial, judicial review, appeal and ultimately retrial. Many (if not most) candidates took a rather academic approach. That would perhaps be fully excusable with fresh law graduates, but was a negative factor in applying the standard of a day 1 solicitor.

Question 3(1):

Candidates were asked whether the client's rights had been infringed. The relevant provisions of the ICCPR and HKBOR concerning delay were set out in the question. Some candidates were astute enough to mention art 87(2) of the Basic Law (not mentioned in the question), which contains a similar provision. Many candidates discussed other rights such as the right to a fair trial (relevant, but unnecessary when a specific delay right exists) and the right to be provided with an interpreter (an issue which on the facts had already been dealt with). Some even did so to the exclusion of discussion the delay right. Perhaps they were relying on pre-prepared answers. Fortunately, most were aware of the distinction between derogable and non-derogable rights, and the need for a proportionality analysis in the case of prima facie breach of the former. It was very disappointing that many candidates (perhaps the majority) found it necessary to consider whether client's status as a foreign domestic helper would somehow deprive her of the usual rights in the criminal process.

Question 3(2):

Here candidates were asked to advise client which remedy or remedies to seek. It was disappointing that many failed to mention any remedy which could have resulted in release of client, whether that be bail, stay of proceedings or judicial review with a view to quash the decision to continue with the prosecution. Far too many candidates would have sought a declaration by way of judicial review and/or damages, while client (apparently) languished in custody. True enough, this is a paper on

constitutional law not criminal procedure, but the day 1 solicitor needs to know how constitutional points arise in all manner of cases clients may face.

Question 3(3):

Candidates were asked in which forum the remedy should be sought. Most candidates correctly answered that constitutional rights may be ventilated in any court or tribunal in proceedings in which they arise, citing the relevant provision of the HK Bill of Rights. However, too many of them went on to contradict themselves by suggesting that somehow the CFI would be the only appropriate forum in this case, ignoring the fact that the District judge dealing with client's case has full power to consider the delay point and grant an appropriate remedy. Similar wording was used by most of those candidates, citing the same authority (Latker). This suggests they were copying from pre-prepared answers.

Many candidates did not apply knowledge that they surely must have of the court structure and jurisdiction. Common mistakes were (i) suggesting that an originating application for judicial review be made direct to the Court of Appeal or the Court of Final Appeal; (ii) suggesting judicial review of the Court of Appeal's decision to order a retrial; and (iii) suggesting an appeal, or judicial review, of denial of bail, rather than making a fresh application based on change of circumstances.

Question 4

This question was the second least popular, being attempted by only 96 candidates. However it had the second highest pass rate, at 76%.

In the first part of the question (which was worth 20 marks), most candidates successfully identified the engagement of constitutional rights under the Basic Law. Most candidates also identified the application of the proportionality test although in some cases there was a distinct lack of application of this test to the facts at issue. That said, the general standard was satisfactory; a handful of answers were excellent.

Candidates also fared generally quite well on the second part of the question (worth 5 marks) concerning the amenability of prosecutorial decisions to judicial review. While a minority of candidates missed the point of the question, or applied seemingly irrelevant precedent, the general response was satisfactory.

There were also a number of candidates who did not attempt an answer to this question at all, or were only able to attempt an answer to 4(1) but not 4(2). This perhaps indicates poor time management generally, or a need for candidates in the future to prepare, to a greater extent, from that part of the syllabus concerning fundamental human rights and judicial review under the Basic Law.

Question 5

This question was the least popular, most likely because candidates were not expecting a question in this area, and was attempted by only 84 candidates. It also had the second highest pass rate at 55%.

The question was divided into two parts. Part 1 was worth 15 marks and required candidates to address two separate issues. The first was to advise on relevant provisions in the Hong Kong Basic Law concerning Hong Kong's future after 30 June 2047, with particular references to any provisions relevant to the continuation of government land leases beyond that date (with a maximum of 10 marks being awarded for answers on this issue). Although Article 5 and 123 are particularly relevant here, answers which put forward reasoned arguments in relation to other provisions in the Hong Kong Basic Law were also given good marks. One problem which arose in a number of answers was to (mis)interpret the question as simply requiring candidates to copy out the text of such provisions without providing any analysis or explanation of their content. Since a real legal advice would not consist of simply copying out a list of statutory provisions, candidates who adopted this approach were penalized.

The second issue in Part 1 concerned whether it would be possible to initiate an amendment to the Hong Kong Basic Law under the circumstances stated in the question (with a maximum of 5 marks being awarded for answers on this issue). Good answers required an understanding of which parties have the power to initiate such an amendment under Article 159(2) of the Hong Kong Basic Law, and this was lacking in some answers.

Part 2 of the question was worth 10 marks and required candidates to identify a procedural defect in an amendment to the Hong Kong Basic Law and advise on whether this issue would be subject to the jurisdiction of the Hong Kong courts. This was generally well answered, with most candidates spotting the failure to consult the Committee for the Basic Law (as required under Article 159(3) of the Hong Kong Basic Law) prior to the adoption of the amendment. Wide leeway was given to candidates in addressing the issue of whether or not this issue would be subject to the jurisdiction of the Hong Kong courts. However, candidates were expected to cite relevant case law, which was lacking in some answers.

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OLQE Examiners' Statement 2019

Head VI: Hong Kong Constitutional Law

Question 1:

This question was the most popular, being attempted by 150 out of the 154 candidates who sat the exam. It had the second highest pass rate of any question, at 89%.

The question required candidates to write a legal opinion for a foreign business client explaining the background to the establishment of the Hong Kong Special Administrative Region, its status under the Hong Kong Basic Law with reference to specific provisions in this document, the differences between a high degree of autonomy and independence, and whether there is any realistic prospect of Hong Kong becoming a separate country.

Answers were generally adequate and most achieved a pass mark. The main problem was that some candidates did not directly address the points specifically raised in the question and instead wrote general answers, or simply repeated various provisions in the Hong Kong Basic Law without making any significant effort to provide the analysis that would be expected in a legal opinion for a client. In some cases, this led to candidates failing to achieve a pass mark.

Question 2:

This question was relatively less popular, being attempted by 121 of the 154 candidates who sat the exam. It had a pass rate of 77%.

This question was divided into two parts, with part (1) being generally less well answered than part (2). Although part (2) carried 15 marks, while part (1) carried only 10 marks, it was surprising to see a significant number of candidates evidently spending more time on part (1) than on part (2), and/or giving insufficient detail or analysis in part (2). Candidates should pay more attention to the division of marks in a question as an indicator of how they might most profitably divide their labour.

Part (1) required candidates to demonstrate an understanding of Basic Law provisions that served as evidence of an executive-led system (or otherwise), but it required more than a mere listing of those provisions without elaboration. A number of candidates adopted this unelaborated approach which would, in itself, be insufficient to obtain a pass mark on this part. Insufficient elaboration and/or analysis was the principal defect in answers to part (1).

Part (2) was generally better answered, with most candidates who attempted this part grasping the key issues and reasoning to a logical conclusion, though again this would have benefited from improved detail and analysis.

Question 3

This question was moderately popular, being attempted by 130 out of the 154 candidates. It had the highest pass rate, at 95%.

Candidates were required to write a research note on constitutional protection of freedom of expression with reference to a specific case described in the question. The overall performance of candidates was very good, as reflected in the 95% pass rate for this question. Nonetheless there were a number of serious errors in some answers. In particular, this year as in the previous year, there were candidates who took the view that constitutional rights depend on immigration status. Some referred to the "immigration reservation" (in the HK Bill of Rights Ordinance). These candidates thought that the client's right to freedom of expression depended on whether he was a Hong Kong permanent resident. Last year they thought that the right of a person charged with a criminal offence to trial without undue delay depended on whether the person was a permanent resident. Candidates may have been taught this by one of the course providers, but this is no excuse. The idea that only permanent residents are entitled to fundamental rights is so abhorrent that any sensible candidate should stand up in shock and say "that can't be right". Furthermore, candidates should be familiar with the whole of the Basic Law. Article 41 of the Basic Law puts the matter beyond doubt, stating that any person in the HKSAR enjoys the protected rights. The "immigration reservation" (s 11 of the HK Bill of Rights Ordinance), if candidates took the time to read it, by its own terms applies only to the entry, stay and departure from Hong Kong of persons not having the right to enter and remain.

The other recurrent error, this year and last, relates to judicial review. Many candidates do not seem to be aware that judicial review is a specific procedure whereby (as you know) the Court of First Instance exercises supervisory jurisdiction over inferior courts, tribunals, the executive branch of government and other decision makers. These candidates seem to think that when any court considers a constitutional point it is conducting "judicial review". Some even suggested applying to the Court of Appeal or Court of Final Appeal for judicial review. They appear to be using "judicial review" in a very loose sense such as review by a judge of a constitutional point. However a lenient view was taken of this error as Head VI is not a procedure paper.

Better candidates did demonstrate an understanding that constitutional points may be raised in any court proceedings in Hong Kong without the need for a separate application for judicial review.

Question 4

This question was the least popular, being attempted by only 72 out of the 154 candidates. It also had the second lowest pass rate, at 72%.

The question was divided into three parts and invited candidates to consider the extent to which the Basic Law protects 'minorities' and/or 'vulnerable' groups. This question gave a great deal of license to candidates to define these terms and develop their answer from the body of available constitutional jurisprudence.

Part 1 (which carried 10 marks) required candidates to consider the range of constitutional rights in the Basic Law and BORO, and specifically whether they are 'adequate' in protecting the interests of minorities/the vulnerable. Candidates generally fared well on this part, both in drawing from provisions and explaining their relevance.

By contrast, candidates generally did not perform as well on Part 2 (also carrying 10 marks), which required candidates to consider the courts' record (giving at least two examples) in protecting minorities/vulnerable candidates, taking into account the margin of appreciation doctrine. Many candidates only described elements of the margin of appreciation doctrine without much thought as to the requirements of the question.

Part 3 (which also carried 5 marks) then required candidates to outline available constitutional remedies and to evaluate their effectiveness. Again, many of the candidates simply described the available remedies without offering any evaluation as per the question.

Question 5

This question was the second most popular, being attempted by 143 out of the 154 candidates. However, it had the lowest pass rate, at 69%.

The question was divided into two parts. Part (1), which carried 10 marks, required the candidates to consider whether the matter in question, concerning an amendment to the Fugitive Offenders Ordinance, ought to be referred to the National People's Congress Standing Committee for an interpretation. Candidates were required to draw from the usual jurisprudence, including the two-part test for making a reference in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [89].

Most candidates successfully identified the appropriate principles, but the standard of their answers varied quite considerably when it came to the application of these principles to the factual scenario in the question. This lack of detailed application meant that many of the candidates scored only borderline passes, and a considerable number failed.

Part 2 (which carried 15 marks) required candidates to consider the Court of Final Appeal's power to review the validity of an Interpretation of the Basic Law by the National People's Congress Standing Committee. Candidates had to engage with the jurisprudence and discuss relevant case law, in particular: *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, [57]–[58] (Li CJ); *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, [107]; *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 26; *Ng Ka Ling v Director of Immigration* (No 2) (1999) 2 HKCFAR 141; *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, 478.

Again, the answers to part (2) varied greatly in quality. However very few engaged with the nuances of this question and all the applicable jurisprudence.

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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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3. Past Examination Papers from 2018 to 2020

**2018 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Thursday, 1 November 2018



2018 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

The Preamble of the Basic Law of the Hong Kong Special Administrative Region ("HKSAR") states that:

Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of "one country, two systems", the socialist system and policies will not be practised in Hong Kong. The basic policies of the People's Republic of China regarding Hong Kong have been elaborated by the Chinese Government in the Sino-British Joint Declaration.

In accordance with the Constitution of the People's Republic of China, the National People's Congress hereby enacts the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, prescribing the systems to be practised in the Hong Kong Special Administrative Region, in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong.

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

Article 31 of the Constitution of the People's Republic of China ("PRC") ("Constitution") stipulates that:

The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.

Taken together, Article 31 of the Constitution and the Basic Law of the HKSAR have created a new type of central-local relationship, that is very different from all other types of central-local relationships within the PRC. Hong Kong and Macau, as Special Administrative Regions, exercise a high degree of autonomy and enjoy a special constitutional and political status.

Questions:

You are asked to write a briefing note for a group of overseas clients who are about to pay their first visit to Hong Kong and seek your advice on Hong Kong's status within the PRC, with particular reference to the following issues:

- (1) The nature of the structure of the Chinese state after the establishment of the Hong Kong and Macau Special Administrative Regions.**
(5 marks)

- (2) The division of powers between the HKSAR and the central authorities under the principle of "one country, two systems" and the Basic Law, with particular reference to those powers exercised by the central authorities.**
(12 marks)

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

(3) The interaction between the HKSAR and the central authorities, with particular reference to when the central authorities can directly intervene in the running of the HKSAR. In order to enable your clients to better understand the situation in this respect, you are advised to give at least two specific examples of the exercise of such powers by the central authorities.

(8 marks)

Question 2 (25 marks)

Anthony and Poppy are local environmental activists who are concerned about air pollution in Hong Kong issuing from industrial and commercial sources in Guangdong province. They were recently elected as members of the Legislative Council on a "clean air" political platform. During Legislative Council debates and meetings, Anthony and Poppy sometimes chant offensive slogans about the authorities in Guangdong province in Mainland China. They are engaging in this behaviour increasingly regularly, which is proving disruptive to proceedings. The President of the Legislative Council (the "President"), who wants to be as fair as possible and show tolerance for diverging political views, has asked Anthony and Poppy over the course of several weeks to stop chanting these slogans during debates and meetings. So far, Anthony and Poppy have ignored the President's requests. Increasingly, public gatherings are being held by supporters of Anthony and Poppy to claim that the failure of the Government of the Hong Kong Special Administrative Region ("HKSAR Government") to challenge the Mainland Chinese authorities over air pollution shows that the "one country, two systems" model is "not working".

The HKSAR Government is worried that the actions of Anthony and Poppy will upset the authorities in Mainland China, and bring the Legislative Council and the HKSAR into disrepute. The Chief Executive therefore launches judicial review proceedings to require the President to declare that Anthony and Poppy are no longer qualified for the office of Legislative Councillor under Article 79(1) of the Basic Law, which states that:

The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances:

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

- (1) *When he or she loses the ability to discharge his or her duties as a result of serious illness or other reasons.*

The Chief Executive argues in the judicial review proceedings that Anthony and Poppy have lost the ability to discharge their duties as a result of their persistent, wilful refusal to comply with the directions of the President, which the Chief Executive argues to be covered by the words "or other reasons" in Article 79(1) of the Basic Law.

The Chief Executive's decision to launch judicial review proceedings is condemned by a large number of members of the legal community in Hong Kong, who argue that it amounts to an assault on the rule of law. The Chief Executive asserts standing in those proceedings on the basis of Article 48(2) of the Basic Law, which states that:

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

- (2) *To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region.*

The judicial review proceedings comprise two distinct parts. The first part of the proceedings seek interim remedies to restrain Anthony and Poppy from continuing to take their seats as members of the Legislative Council. The court refuses to grant those interim remedies. The second set of proceedings seek orders of mandamus to compel the President to declare that Anthony and Poppy are no longer qualified for the office of Legislative Councillor under Article 79(1) of the Basic Law. The second

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

part of the proceedings are currently in progress, but it is widely expected that the National People's Congress Standing Committee ("NPCSC") will issue an interpretation of Article 79(1) of the Basic Law which would effectively require the President to declare that Anthony and Poppy are no longer qualified for the office of Legislative Councillor. It is expected that the NPCSC will issue its interpretation before judgment is given in the second set of judicial review proceedings.

Questions:

You represent Poppy in the second set of judicial review proceedings. Poppy asks you to advise her on the following issues:

(1) Whether the ability of the NPCSC to issue an interpretation of Article 79(1) of the Basic Law, before judgment is given in the second set of judicial review proceedings, represents a threat to the separation of powers and the rule of law? Explain your answer.

(15 marks)

(2) Can arguments be advanced to claim that the standing of the Chief Executive asserted on the basis of Article 48(2) of the Basic Law jeopardises the rule of law? If so, what arguments could the Chief Executive be expected to advance in response, to suggest that standing asserted on this basis serves to uphold the rule of law?

(10 marks)

You are not expected to show detailed knowledge of Legislative Council procedures in sub-questions (1) or (2) of your answer.

Question 3 (25 marks)

You are a newly admitted solicitor in the Hong Kong office of a large international firm. Pro bono advice is provided by the firm to disadvantaged members of the community as part of its policy of 'giving back'.

A human rights advocacy group has referred the case of Miss X to your firm. The main concern is delay in a criminal case against Miss X, who has been in custody for 4 years.

Reading the file, you see that the basic facts are as follows:

1. Miss X was previously employed as a domestic helper by Madam Y.
2. On 17 July 2014, Miss X was arrested and charged with theft from Madam Y.
3. The alleged theft was of an emerald brooch said by Madam Y to be worth hundreds of thousands of dollars.
4. Miss X denies the charge. She says that the allegation of theft was made up by Madam Y as an excuse to terminate the employment without notice after an argument between the two over Miss X's alleged failure properly to 'hand wash' Madam Y's undergarments.
5. Miss X has photo evidence which she claims shows Madam Y wearing the brooch at a gala dinner several months after the theft allegedly took place.

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

6. When Miss X appeared before a magistrate she requested that her case be transferred to the Court of First Instance so that she could have a jury trial. Her application was denied.
7. At the same time, bail was refused on the basis of the prosecution's objection that Miss X was a flight risk on account of the seriousness of the alleged crime and the strength of the evidence.
8. Miss X then applied for judicial review of the refusal to transfer her case to the Court of First Instance. She was unsuccessful. She also applied for bail in the Court of First Instance, again without success.
9. Eventually, Miss X's case was transferred to the District Court for trial. Trial took place before His Honour Judge Z over 7 days in September 2016. The judge found Miss X guilty and sentenced her to 6 years in prison, saying she was a greedy woman who had breached the trust of her employer.
10. During the 7-day trial there had been long exchanges between Miss X and the court interpreter engaged to translate the evidence to and from Tagalog, the main language of the Philippines. Miss X complained that she did not understand Tagalog well, as she had grown up speaking another dialect. At the time, this complaint was made only to the court interpreter and was not explained to the court, nor to the lawyers involved.
11. Miss X successfully appealed against conviction. The Court of Appeal found that the interpretation provided to Miss X at trial had been inadequate. A re-trial before a different District Court judge was ordered.

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

12. It is now late 2018. Miss X has been in custody for over 4 years while the legal proceedings have been on-going. Her re-trial in the District Court has been fixed for February 2019. Unless granted bail in the meantime, by the commencement of the re-trial Miss X will have been in custody for 4 years and 7 months.

According to Article 9(3) of the International Covenant on Civil and Political Rights ("ICCPR") , and Article 5(3) of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"):

Anyone arrested or detained on a criminal charge ... shall be entitled to trial within a reasonable time or to release ...

Article 11(2)(c) of the HKBORO and Article 14(3)(c) of the ICCPR provide:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...
(c) to be tried without undue delay

You have written to the prosecution raising Miss X's concerns about violation of her right to trial without undue delay. They do not deny that there has been excessive delay. However, they take the view that Miss X is herself partly to blame for the delay because of the judicial review application, and the fact she did not complain about inadequate interpretation during the first trial. As a result, the prosecution intends to proceed with the re-trial.

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

Questions:

You are asked to prepare a note, with reasons, advising on the following three points:

- (1) Have Miss X's rights been infringed? Explain, with full reasons.**

(15 marks)

- (2) Assuming Miss X's rights have been infringed, which remedy or remedies might be available? Explain briefly, and choose a remedy or remedies which you would advise Miss X to seek.**

(5 marks)

- (3) In which court, tribunal or other forum would any such remedy best be sought? Explain your answer briefly.**

(5 marks)

Question 4 (25 marks)

E suffered from motor neurone disease at the time of her death. E was diagnosed with motor neurone disease in June 2014. At first, E was able to carry on her life as normal. But after time, the common symptoms of the disease began to show, including muscle deterioration. E found it more and more difficult to do things herself. She became increasingly dependent on her husband, M, a medical doctor. By mid 2016, E's deterioration was such that she became confined to an electric wheel-chair.

E did not want the pain to increase to a point where her life was utterly unbearable and her death undignified. She wanted to end her life before then. However, as E would in the future be in a condition where she would be unable to do anything without the assistance of another, she needed help to commit suicide. She therefore discussed with M her wish to end her life when the time came. M, although devastated by her deteriorating condition, wanted her death to be dignified. He agreed to help E carry out her wish.

However, E was worried about what would happen to M if he helped her commit suicide. She was concerned that he would be prosecuted. This is a possibility under section 33B of the Offences Against the Person Ordinance (Cap. 212) ("OAPO"), which provides:

33B. Criminal liability for complicity in another's suicide

- (1) *A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be guilty of an offence triable upon indictment and shall be liable on conviction to imprisonment for 14 years.*

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

- (2) *If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of the offence so proved.*
- (3) *No proceedings shall be instituted for an offence under this section except with the consent of the Secretary for Justice.*

She wrote to the Secretary for Justice to seek assurances that M would not be prosecuted. She also asked about the circumstances under which the Secretary for Justice, would prosecute someone who assisted another to commit suicide. The Department of Justice replied:

We would like to express our deepest sympathy for your condition and the suffering you and your family have to bear...You have asked for an undertaking that M would not be prosecuted under section 33B of the Offences Against the Person Ordinance (Cap. 212), in the event he assisted you to commit suicide. We are unable to grant any immunity or assurance of non-prosecution in the event that your husband helped you to commit suicide. Instead, we will evaluate whether a prosecution is warranted in this case in accordance with our general policy applied to all prosecutions, which looks to whether a prosecution ought to be brought in the public interest.

By March 2018, E was feeling pain on a greater level than before. While being uncertain whether he would be prosecuted, M was adamant that he would help E regardless. In April 2018, M helped E overdose on methadone. E died with her closest friends and family around her bedside.

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

The Hong Kong police learnt of E's death by methadone overdose. They arrested and charged M on suspicion of an offence contrary to section 33B of the OAPO. Pursuant to section 33B(3), the Secretary for Justice gave his consent for M to be prosecuted for an offence under that section. M then commenced judicial review proceedings on the ground that section 33B was unconstitutional and that the Secretary for Justice should not have consented to the prosecution.

The Court of First Instance ("CFI") rejected M's application. First, they held that section 33B was consistent with the Basic Law and Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"), as it could not be said on reasonable construction that there was 'a right to die with the assistance of another' in these instruments. Second, they held that there was no basis to review the Secretary for Justice's decision to consent to the prosecution as this was shielded by Article 63 of the Basic Law, which provides: "*The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.*" Accordingly, the courts were unable to review the decision of the Secretary for Justice, as to do so would amount to an 'interference'.

Questions:

You are to assist in drafting the grounds of appeal.

(1) Advise whether section 33B of the OAPO infringes any rights under the Basic Law and/or the HKBORO.

(20 marks)

(2) Assuming that section 33B of the OAPO is constitutional, do you agree with the CFI's conclusion that Article 63 of the Basic Law shields the decision of the Secretary for Justice from judicial review?

(5 marks)

Question 5 (25 marks)

Your client, Small Homes Ltd., is a major property developer in Hong Kong with a large bank of land. They are concerned about the implications for their business of what they describe as "expiry of one country, two systems" after 30 June 2047 and believe the Hong Kong Basic Law, as currently worded, offers little guidance on what will happen after this date. Small Homes Ltd. approach the Central People's Government, which states that it would be willing to support an amendment to the Hong Kong Basic Law stipulating that "subject to acceptable behaviour by the residents of the Hong Kong Special Administrative Region, the existing 'one country, two systems' arrangements may continue beyond 30 June 2047". However, many members of the Legislative Council of the Hong Kong Special Administrative Region ("HKSAR") are angry at what they perceive as a threat contained in the wording of this proposed amendment and, as a result, more than half of all lawmakers declare they would oppose any amendment that includes wording that refers to "acceptable behaviour by the residents of the HKSAR".

Question:

- (1) Advise Small Homes Ltd. on the most relevant provisions in the Hong Kong Basic Law concerning Hong Kong's future after 30 June 2047, with particular reference to any provisions relevant to the continuation of government land leases beyond that date, and on whether it would be possible to initiate an amendment to the Hong Kong Basic Law under the circumstances stated above.**

(15 marks)

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

Opposition to the proposed amendment to the Hong Kong Basic Law subsides after the Central People's Government agrees that the wording referring to "acceptable behaviour by the residents of the Hong Kong Special Administrative Region" requirement can be deleted, and a modified version of the amendment is rushed through the National People's Congress. However, due to lack of time, no committees of either the National People's Congress or its Standing Committee are consulted beforehand.

Question:

- (2) Advise Small Homes Ltd. on whether there are any grounds to be concerned about the legal validity of the amendment adopted by the National People's Congress and, if so, whether the issue would be subject to the jurisdiction of the courts of the HKSAR.**

(10 marks)

END OF TEST PAPER

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Friday, 1 November 2019



2019 Overseas Lawyers Qualification Examination

Head VI: Hong Kong Constitutional Law

Question 1 (25 marks)

In the recent protests against the government's proposed amendments to Hong Kong's extradition laws on 1 July 2019, some protesters shouted slogans advocating Hong Kong independence, and waved what they described as the flag of an independent Hong Kong.

Henry is a foreign businessman who is visiting Hong Kong. He observed the protests and was surprised to see the flag of an independent Hong Kong. As a newcomer to Hong Kong, he knows very little about the background to "one country, two systems", and is confused about the difference between a high degree of autonomy and independence.

Question:

Before deciding whether to invest in Hong Kong, Henry seeks your advice asking you to provide him with a legal opinion explaining the background to the establishment of the Hong Kong Special Administrative Region ("HKSAR"), its status under the Hong Kong Basic Law with reference to specific provisions in this document, the differences between a high degree of autonomy and independence, and whether there is any realistic prospect of Hong Kong becoming a separate country.

Advise Henry.

(25 marks)

Question 2 (25 marks)

The Chief Executive of the HKSAR has been a staunch supporter of a Legislative Council bill (the "Bill") that would prohibit the sharing of information about protests in Hong Kong with persons located in Mainland China. This includes the sharing of information by electronic means, for example by e-mail, text or on social media. The HKSAR Government cited "national security" concerns in relation to the objectives of the Bill in a Legislative Council briefing paper, and it is widely suspected that the Bill is aimed to prevent similar protests arising in Mainland China.

The Bill has been condemned by members of the legal and political communities in Hong Kong as an assault on freedom of speech. It has also resulted in a number of protests across the territory, some of which have resulted in damage to public property. Nevertheless, the Chief Executive has made an unusually large number of public and media appearances speaking in support of the Bill, both prior to its formal introduction and during the legislative process. This has led to widespread concern about the Chief Executive's role in, and influence on, the legislative process.

Your client, Philip, is a local student. He intends to apply for judicial review seeking, among other things, an order that the Bill, if enacted as an Ordinance, be declared unconstitutional. In preparation for the case, Philip asks you to explain to him what is meant by "executive-led" government, with particular reference to how laws are made.

Question:

- (1) Explain to Philip the concept of "executive-led" government, with particular reference to the legislative process.**

(10 marks)

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

Philip also wants to argue in his application for judicial review that the judge cannot be regarded as independent in line with the requirements of the Basic Law, as the Chief Executive appoints judges in the HKSAR under Article 48(6) of the Basic Law, and the Chief Executive is also expected to be cited as a respondent in the application for judicial review for her role in supporting the Bill.

Question:

- (2) Advise Philip as to whether you expect his argument that the judge cannot be regarded as independent to be successful or unsuccessful in court. Explain your answer.**

(15 marks)

Question 3 (25 marks)

You are a newly admitted solicitor in Hong Kong. A file concerning freedom of expression has been passed to you to prepare a research note.

The client is a junior police officer who has been charged with an offence under section 34 of the Police Force Ordinance (Cap. 232). That section provides:

"Any police officer who threatens or insults another officer of senior or equal rank when such other officer is on duty or when such threat or insult relates to or is consequent on the discharge of duty by the officer so threatened or insulted, shall be liable on summary conviction to a fine of \$500 or to imprisonment for 1 year."

Following a demonstration by several hundred thousand people earlier this year on the streets of Hong Kong, which resulted in violence, there was a closed-door de-briefing session attended by around 1,000 police officers, including the client. Some of the front-line officers who had been at the scene were upset that they had been ordered to use what they considered to be excessive force. Others took the opposite view, that senior officers had been too lenient, preventing front-line officers from using sufficient force to maintain public order. The client took part in a heated exchange with other officers at the closed-door de-briefing session. At one point he shouted foul language at his senior officers and referred to them as animals.

All of the facts alleged against the client are admitted, and it is further admitted that those facts would be sufficient to found a conviction, subject only to the question of the client's constitutionally protected right to freedom of expression.

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

Although the penalty on conviction might be fairly lenient, the case is of great importance to the client, because after conviction he might face police disciplinary proceedings which could result in loss of his job, quarters and pension.

Question:

Prepare a research note on constitutional protection of freedom of expression and advise whether it might afford the client a legal defence at trial. The note is for your supervising partner to assist at a forthcoming meeting with the client to consider how to proceed. You should refer to relevant constitutional provisions and cite relevant case authority(ies).

(25 marks)

Question 4 (25 marks)

Your law firm is looking to establish a public interest *pro bono* practice to represent the interests of 'minorities' and/or 'vulnerable groups' in the Hong Kong community through the strategic use of constitutional litigation.

Questions:

You have been asked to write a briefing note for your supervisor on some of the features of judicial review in Hong Kong and how this relates to the aforementioned groups. This note must refer to specific provisions of the Basic Law and relevant jurisprudence. It must address the following three issues:

(1) Whether the range of rights in the Basic Law provide 'adequate' protection for the interests of minorities and/or vulnerable groups in the Hong Kong community.

(10 marks)

(2) The record of the courts in affording constitutional protection to the interests of minorities and/or vulnerable groups in the Hong Kong community. Consider also whether the 'margin of appreciation' doctrine has affected the extent to which the courts have given such groups constitutional protection. Substantiate your answer to this sub-question with at least two examples where the constitutionality of legislation has been challenged.

(10 marks)

(3) The extent to which the remedies available in constitutional judicial review are able to advance the interests of 'minorities' and/or 'vulnerable groups' in the Hong Kong community.

(5 marks)

Question 5 (25 marks)

Consider this hypothetical scenario.

The Transfer of Fugitive Offenders Ordinance ("Ordinance") came into effect in 2019. It would allow extradition of criminal suspects from the HKSAR to the People's Republic of China ("PRC"). The Ordinance was silent on whether an extradition could be refused based upon the principle espoused in *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 ("*Ubamaka*"), which prevents the removal of an individual from the HKSAR to a destination where there was a sufficiently established threat that their non-derogable and absolute human rights would be violated by the receiving authority.

Questions:

You are asked to prepare a research briefing dealing with the scope of the National People's Congress Standing Committee's ("NPCSC") power to interpret the Basic Law in a manner that disapplies the application of the *Ubamaka* principle to extraditions from the HKSAR to the PRC. Your briefing must cite relevant provisions of the Basic Law and jurisprudence. It must address the following issues:

- (1) Is this a matter that the Court of Final Appeal ("CFA") would have to seek from the NPCSC an Interpretation of the Basic Law?**

(10 marks)

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

- (2) Assuming that the NPCSC decides to issue an Interpretation of the Basic Law of its own motion which excludes the applicability of the *Ubamaka* principle to extradition cases, to what extent could the CFA review the validity of this Interpretation, or otherwise read down its effects?

(15 marks)

END OF TEST PAPER

**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