

**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**