

**2018 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Thursday, 1 November 2018



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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.

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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)

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- (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:

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- (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

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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.

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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.

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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.

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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.*

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- (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.

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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)

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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