

**2021 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 2 November 2021



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Question 1 (25 marks)

Raymond works for a corporate law firm in Sydney, Australia. He is seconded to a partner firm in Hong Kong which also specialises in corporate law. In order to expand his understanding of Hong Kong's law and legal system, and the relationship between the Hong Kong Special Administrative Region ("HKSAR") and the People's Republic of China ("PRC") as a whole, Raymond spends some time reading about Hong Kong constitutional law.

During his research, Raymond has noticed that there appear to be inconsistencies and contradictions between two of the major constitutional texts that apply to the HKSAR, namely the "Constitution of the People's Republic of China" ("PRC Constitution") and the "Basic Law of the HKSAR" ("Basic Law"). For example, Article 1 of the PRC Constitution states that the PRC is a "socialist state" and that "the socialist system is the basic system of the People's Republic of China", whereas Article 5 of the Basic Law states that "the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

Raymond has also formed the view that some recent constitutional law developments in the HKSAR seem to be inconsistent with the terms of the Sino-British Joint Declaration. He wonders whether the Sino-British Joint Declaration might be used in litigation to challenge the legality of certain government actions.

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

Questions:

Raymond approaches you for the following advice:

- (1) Are the PRC Constitution and the Basic Law incompatible? How are inconsistencies and contradictions between the PRC Constitution and the Basic Law resolved?**

(10 marks)

- (2) Can the Sino-British Joint Declaration be used in litigation to challenge the legality of government action? Explain your answer.**

(15 marks)

Question 2 (25 marks)

In *Ng Ka Ling & Others v. Director of Immigration*, (1999) 2 HKCFAR 4, 25GI, the Court of Final Appeal (“CFA”) expressed its opinion on the jurisdiction of the courts over legislative and executive branches of the government of the Hong Kong Special Administrative Region (“HKSAR”):

“They [the courts] undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency.” (Emphasis added)

In *Cheng Kar Shun v. Li Fung Ying*, [2011] 2 HKLRD 555, 617 the Court of First Instance (“CFI”) also suggested that the courts may need to exercise some caution in exercising jurisdiction over the legislative branch:

“The courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal workings of the Legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the Government.” (Emphasis added)

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

In reaching the above conclusion, the CFI referred to a UK case *Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette* [2000] 5 LRC 196 at para. 218, and made this comparison:

“The general principles stated by the Privy Council in that case, rather than the facts, are pertinent for our present purposes. Lord Nicholls, delivering the judgment of the Judicial Board, pointed out that the courts’ recognition of Parliament’s exclusive control over the conduct of its own affairs in the United Kingdom is essential to the smooth workings of a democratic society which espouses the separation of powers between a legislative parliament, an executive government and an independent judiciary; the courts must be ever sensitive to the need to refrain from trespassing, or even appearing to trespass, upon the province of the legislators.” (Emphasis added)

Questions:

You are working for a law firm in Hong Kong with a large number of international clients. You are approached by a German client which does business with the HKSAR Government and seeks your advice in order to understand the governmental structure in Hong Kong. Based on the abovementioned CFA and CFI cases as well as other relevant case law, and with reference to specific provisions in the Basic Law:

- (1) Explain the overall governmental structure of the HKSAR with particular reference to how far it constitutes a system of separation of powers and/or a system of executive-led government. (10 marks)**
- (2) Explain the relationship between the legislative, executive and judicial branches of the HKSAR Government, with reference to actual examples from recent events. (15 marks)**

Question 3 (25 marks)

Your supervising partner has asked you to prepare some notes to help in advising a new client, Ms. Mabel Leigh, in a forthcoming meeting. Ms. Leigh has helpfully provided a letter setting out the background. The letter says:

“Dear Solicitors,

I would like your help in resolving an issue between myself and the Smart Kid Tutorial College of Sheung Wan, Hong Kong (“Smart Kid”).

Smart Kid offered me a teaching job in early 2021 while I was completing further studies at Cambridge University in the United Kingdom (“UK”). I accepted immediately as it would give me the opportunity to spend time with my ageing relatives who still live in Hong Kong.

When I arrived in Hong Kong and met the Smart Kid headmistress, she said she was sorry, but that I could not take up the post as English tutor. She told me, indirectly, that the parents of Smart Kid’s pupils were paying top dollar for their children to be tutored by native English speakers and that it would be bad for business to have a Chinese face in the job. I pointed out that I am a native English speaker and had a written contract for the job. The headmistress offered me another post, with the same salary and benefits, as recruitment officer – essentially a sales position. I did not accept the sales position because I have no experience in that field and have no interest in it.

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

Although I am of Chinese ethnic origin, I was born in the UK when my parents were both law students there. I attended boarding school and university in the UK and have lived there my whole life.

Recently I learned that Smart Kid hired a replacement to do the teaching job. The replacement has similar qualifications and experience as me, but she is of pure British stock. The replacement took me out for lunch last week and said that I had been treated unfairly and that I should do something about it.

Please advise me what I can do.

Sincerely,

Mabel Leigh”

Question:

You are asked to prepare brief notes to help your supervising partner prepare for the meeting with Ms. Leigh. Your notes should identify any relevant constitutional and statutory provisions, the remedies which might be available and how Ms. Leigh might be able to go about seeking them.

Your notes may be in point form if you wish.

(25 marks)

Question 4 (25 marks)

You are a solicitor working for a firm specialising in judicial review. You have been asked by your supervisor to deliver a presentation to a visiting delegation from overseas who are unfamiliar with the concept of judicial review as practised in the Hong Kong Special Administrative Region (“HKSAR”).

Questions:

You are asked to prepare speaking notes for your presentation that, incorporating provisions from both the Basic Law and relevant case law, explain the:

- (1) Meaning of ‘judicial review’ in the HKSAR and the approach of the Hong Kong courts towards reviewing legislative and executive actions;**

(15 marks)

- (2) Remedial powers of the courts, including the limits to those remedies.**

(10 marks)

Question 5 (25 marks)

You are a newly qualified solicitor. Your supervisor is convening a Continuing Professional Development seminar on various aspects of interpretation of the Basic Law by the National People's Congress Standing Committee ("NPCSC") and the Hong Kong courts.

Questions:

You are asked to prepare a research brief on the following two questions relating to Article 158 of the Basic Law:

- (1) Explain the rationale pertaining to the arrangements for interpretation of the Basic Law that are set out in Article 158 of the Basic Law.**

(10 marks)

- (2) Drawing on the NPCSC interpretive practice under Article 158, identify the salient differences between the various interpretations issued by the NPCSC and their impact on the implementation of relevant provisions in the Basic Law.**

(15 marks)

END OF TEST PAPER