

**2022 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD VI: HONG KONG
CONSTITUTIONAL LAW**

Tuesday, 1 November 2022



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Question 1 (25 marks)

China is a unitary state. The administrative areas in the People's Republic of China (the "PRC") are divided into provinces, autonomous regions and cities directly under central government jurisdiction (Article 30 of the Constitution of the PRC ("PRC Constitution")). In addition, "The state may establish special administrative regions when necessary." (Article 31 of the PRC Constitution) This means that China has four types of subnational constituents situated at the same level.

Article 1 of the Basic Law of the Hong Kong Special Administrative Region (the "HKSAR") states that: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China."

Article 12 of the Basic Law of the HKSAR defines the status of the HKSAR as "a local administrative region" of the PRC as follows: "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government." This Article indicates that the HKSAR shall come directly under the Central People's Government (the "CPG"), while enjoying a high degree of autonomy.

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

In *The Practice of the “One Country, Two Systems” Policy in the HKSAR*, a governmental white paper issued by the CPG in June 2014 (the “2014 White Paper”), the CPG further defined the meaning of the “One Country, Two Systems” policy which relates to the understanding of the status of the HKSAR under the PRC Constitution as follows:

The “one country” means that within the PRC, the HKSAR is an inseparable part and a local administrative region directly under China’s Central People’s Government. As a unitary state, China’s central government has comprehensive jurisdiction over all local administrative regions, including the HKSAR. The high degree of autonomy of HKSAR is not an inherent power, but one that comes solely from the authorization by the central leadership. The high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power. It is the power to run local affairs as authorized by the central leadership. The high degree of autonomy of HKSAR is subject to the level of the central leadership’s authorization. There is no such thing called “residual power.” The most important thing to do in upholding the “one country” principle is to maintain China’s sovereignty, security and development interests, and respect the country’s fundamental system and other systems and principles.

Questions:

You are invited by the managing partner of your law firm to prepare a written speech to be delivered as a presentation to a group of visiting colleagues from overseas who are interested in understanding more about Hong Kong’s status in the PRC, with specific reference to the following three points:

(1) The relationship between the HKSAR and the PRC in a unitary state.

(5 marks)

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

(2) The vertical division of powers between the HKSAR and the central authorities under the principle of “One Country, Two Systems” and the Basic Law. Identify the powers that belong to the central authorities.

(10 marks)

(3) The interaction between the HKSAR and the central authorities, including when the central authorities can intervene in the operation of the HKSAR. Give at least two examples with reasons to justify the appropriateness of the use of these powers by the central authorities.

(10 marks)

Question 2 (25 marks)

Carrie is a retired civil servant who has developed an interest in Hong Kong constitutional law. She has become particularly interested in judicial independence. While reading the Basic Law, Carrie is confused about the relationship between Articles 85 and 88 of the Basic Law.

Article 85 of the Basic Law states:

“The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.”

Article 88 of the Basic Law states:

“Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.”

Carrie asks you for advice on the relationship between Articles 85 and 88 of the Basic Law with regard to judicial independence and the appointment of judges.

Question:

- (1) **Are Articles 85 and 88 of the Basic Law incompatible? Explain your answer.**
(10 marks)

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

Carrie also considers the relationship between judicial independence and Article 158 of the Basic Law, which states in part that the power of interpretation of the Basic Law shall be vested in the Standing Committee of the National People's Congress ("NPCSC"), and that when the NPCSC makes an interpretation of provisions of the Basic Law, the courts of the Region, in applying those provisions, shall follow the interpretation of the NPCSC.

Question:

(2) Does Article 158 of the Basic Law challenge or qualify the judicial independence enjoyed by the Hong Kong courts? Explain your answer.

(15 marks)

Question 3 (25 marks)

In response to the social and economic fallout of the Covid-19 pandemic, Super Lucky Gold Dragon Plc (the “Company”), a multinational enterprise listed on the Hong Kong Stock Exchange, has published a workplace policy (the “Policy”) to support its employees in Hong Kong. The Company employs a multinational workforce in its Hong Kong office, which is also its head office. The terms of the Policy were published only on the Chinese language intranet site (in traditional characters) of the Company and are as follows:

1. The Company will pay a one-off Covid-19 bonus in the amount of HK\$10,000 to each qualifying employee currently employed in Hong Kong, and who has not resigned or otherwise been dismissed.
2. In order to qualify for a payment under the Policy, an employee must further be:
 - a. a Hong Kong Permanent Resident (“HKPR”);
 - b. lawfully married whether in Hong Kong or in any other jurisdiction, and not judicially separated; and
 - c. employed on a full-time basis, and not on work from home arrangements.

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

As a newly qualified associate in the litigation boutique firm, Dobermann & Rottweiler, you are asked by your supervising partner to give pro bono advice in relation to the Policy and you have received the following two e-mails from potential clients:

1. Amber Almeida (“Amber”) is an employee of the Company and a citizen of the Philippines. She has ordinarily resided in Hong Kong for six years, but she is not yet a HKPR. She believes that the Policy is discriminatory against her because it is limited to HKPRs. When she complained to her line manager, who is a US citizen of Filipino origin, she was made redundant. A sympathetic colleague later forwarded Amber a WhatsApp message in which her line manager in a separate discussion had written of her, “Amber has to go – these Indonesians complain too much – they’re not team players!”
2. Bastian Bux (“Bastian”) is a HKPR employee of the Company in a same-sex marriage with his husband, whom he married in Germany, where same-sex marriage is legal. He applied under the Policy, but received a notification in writing from the Company declining his application on the basis that only heterosexual marriages could be regarded as valid marriages for the purposes of enjoying the benefit of the Policy. He wishes to argue that this refusal is unlawful and discriminatory. Bastian also complains that he cannot read the terms and conditions of the Policy in detail, as he has no proficiency in the Chinese language.

Question:

Advise Amber and Bastian on their rights at Hong Kong law and briefly outline any relevant remedies they may seek.

(25 marks)

Question 4 (25 marks)

You are asked to advise a longstanding client whose 19-year-old son, John, has just been questioned under caution by officers from the National Security Department of the Hong Kong Police. You interview John who informs you that he attended the interview voluntarily without the presence of a lawyer assisting him and signed a statement confirming he had participated in the following activities:

- (a) Shouting “Independence for Hong Kong” (i) during a lawful and peaceful public assembly outside the Legislative Council Complex on 1 July 2022 which had received a Notice of No Objection from the Hong Kong Police; and (ii) during an unlawful and sometimes violent public assembly in Victoria Park on 7 July 2022 which went ahead despite objections from the Hong Kong Police;
- (b) Holding a banner stating “Overthrow the Central People’s Government” (i) during a lawful and peaceful public assembly outside the Legislative Council Complex on 1 July 2022 which had received a Notice of No Objection from the Hong Kong Police; and (ii) during an unlawful and sometimes violent public assembly in Victoria Park on 7 July 2022 which went ahead despite objections from the Hong Kong Police;
- (c) Making multiple posts on social media which encouraged readers to express their “hatred, contempt and disaffection” against the Hong Kong Special Administrative Region Government and the administration of justice in Hong Kong.

John informs you that, although he does not deny participating in the above activities, he wishes to plead not guilty to any charges which may be brought against him in relation to these activities and, where possible, challenge the constitutionality of any offences with which he is charged.

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

Questions:

Advise John as to:

(1) any possible criminal offences he may have committed by participating in the above activities;

(9 marks)

(2) any possible defences to these offences, with particular reference to the prospects for successfully challenging the constitutionality of some or all of these offences.

(16 marks)

Extracts of the relevant sections of Crimes Ordinance, Cap. 200 are on pages 10-11.

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

Statutory Provisions Relevant to Question 4

Section 9 of Cap. 200: Seditious intention

- (1) A seditious intention is an intention—
- (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established; or
 - (b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
 - (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
 - (d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
 - (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or
 - (f) to incite persons to violence; or
 - (g) to counsel disobedience to law or to any lawful order.
- (2) An act, speech or publication is not seditious by reason only that it intends—
- (a) to show that Her Majesty has been misled or mistaken in any of Her measures; or
 - (b) to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

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

- (c) to persuade Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or
- (d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Hong Kong.

Section 10(1)-(2) of Cap. 200: Offences

- (1) Any person who—
 - (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or
 - (b) utters any seditious words; or
 - (c) prints, publishes, sells, offers for sale, distributes, displays or reproduces any seditious publication; or
 - (d) imports any seditious publication, unless he has no reason to believe that it is seditious,

shall be guilty of an offence and shall be liable for a first offence to a fine at level 2 and to imprisonment for 2 years, and for a subsequent offence to imprisonment for 3 years; and any seditious publication shall be forfeited to the Crown.

- (2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and shall be liable for a first offence to a fine at level 1 and to imprisonment for 1 year, and for a subsequent offence to imprisonment for 2 years; and such publication shall be forfeited to the Crown.

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. **She has asked you to prepare a research brief in particular on Article 158 of the Basic Law. Your brief has to address the following two issues:**

(1) Explain the meaning and application of the ‘classification’ and ‘necessity’ conditions governing the circumstances in which a judicial reference to the Standing Committee of the National People’s Congress is required. Justify your response with reference to provisions of the Basic Law and case law.

(15 marks)

(2) Explain the limits of the powers of interpretation under the Basic Law respectively of the Court of Final Appeal and the Standing Committee of the National People’s Congress. Justify your response with reference to provisions of the Basic Law and case law.

(10 marks)

END OF TEST PAPER