OLQE Examiners’ Comments 2022
Head VI: Hong Kong Constitutional Law

Question 1

This question was the most popular, being attempted by all 69 candidates who sat the exam. It had a pass rate of 93%.

This question was divided into three parts and required candidates to prepare a written speech to be delivered as a presentation to a group of visiting lawyers from overseas who are interested in understanding more about Hong Kong’s status in the PRC.

The first part (worth 5 marks) asked candidates to define relationship between the HKSAR and the PRC under the unitary state system. Most candidates were able to understand and answer it correctly by stating that under the Chinese constitution, China is a unitary state, and by citing relevant articles of the BL such as Arts 1 and 12.

The second part (worth 10 marks) dealt with the vertical division of powers between the HKSAR and the central authorities under the principle of “One Country, Two Systems” and the Basic Law. Again, most were able to identify these powers that belong to the central authorities by referring to the articles in the BL and explaining the circumstances where the central authorities can exercise and have actually exercised these powers. However some other candidates were unable to do this comprehensively.

The third part (also worth 10 marks) aimed at examining candidates’ understanding of firstly the *interaction* between the HKSAR and the central authorities, and secondly the *circumstances* in which the central authorities have the power to intervene in the operation of the HKSAR. This proved a more difficult part of the question. While many candidates provided good answers on the *interaction* aspect they often failed to answer the *circumstances* aspect of the question. This requires candidates to have a thorough understanding of the HKSAR government vis a vis the central authorities. Simply reading and comprehending the text of the BL is not enough. That said, a small number of candidates were able to give examples of such *interaction* and provide comments on the appropriateness, or otherwise, of the use of these powers by the central authorities and received more marks as a result.

Question 2

This question was also very popular, being attempted by 66 of the 69 candidates who sat the exam. It had a pass rate of 94%.

The question was divided into two parts. Part 1 (worth 10 marks) asked candidates whether Articles 85 and 88 of the Basic Law are incompatible. This part of the question was generally well answered. Marks were awarded for reasonable analysis which addressed the relationship between the substance of the two Articles. A range of articles were often cited by candidates in their analysis, such as Articles 89, 90, 92 and 104 of the Basic Law. Though many candidates correctly discussed the role of the Judicial Officers Recommendation Commission, some candidates lost marks for failing to do so. There was no expectation that candidates argue in favour of a particular conclusion - either that Articles 85 and 88 are or are not compatible - but most candidates argued that they are compatible.

Part 2 (worth 15 marks) asked candidates whether Article 158 of the Basic Law challenges or qualifies the judicial independence enjoyed by the Hong Kong courts. This part of the question was also generally well answered. Marks were awarded for reasonable analysis which addressed the relationship between judicial independence and Article 158 of the Basic Law. Stronger answers provided a more balanced analysis which identified which parts of Article 158 might challenge or qualify judicial independence and which parts might provide a counterbalance. Some candidates gave good examples of how specific NPCSC interpretations related to the substance of the question. A smaller number of candidates gave a more formulaic answer about NPCSC interpretations which failed to substantially address what was asked by the question. There was no expectation that candidates argue in favour of a particular conclusion - either that Article 158 does or does not challenge or qualify judicial independence - but most candidates argued that Article 158 either does not, or only partly, qualifies judicial independence.

Question 3

This question was relatively less popular, being attempted by 50 of the 69 candidates who sat the exam. It also had the lowest pass rate at 38%.

This question focused on human rights in the context of anti-discrimination legislation, with candidates being asked to advise on rights and remedies in relation to two scenarios involving possible issues of discrimination.

Scripts were in general of a poor standard, with a disappointing number being totally deficient. A majority of candidates failed to spot that the Company was not a public body, but a private law entity. It is, accordingly, by definition not amenable to judicial review. This is a basic point of law, widely accepted in both civil and common law jurisdictions: it is not a recondite quirk of Hong Kong law.

Many candidates did not read the question properly and instead launched into a desultory, pre-written answer, which in many cases involved cobbling together set phrases from their notes. Every effort was made to give the benefit of the doubt. But most answers were marred by a great deal of irrelevance, a failure to engage with the facts, and a complete ignorance of even basic principles of statutory construction.

Better candidates immediately spotted that the Company was not amenable to judicial review and, having overcome that first hurdle, almost invariably passed. Stronger answers showed an ability to engage with the Race Discrimination Ordinance (RDO) and the other legislative materials and formulate clear, well thought-out responses that evidenced an understanding of the lacunae in Hong Kong's current anti-discrimination regime.

A small number of candidates made a serious effort to do book-work during the exam (as one would be expected to do in practice) by looking up the RDO and seeking to apply the relevant provisions. Those who did this book-work correctly spotted that A's claim on the basis of not being a Hong Kong Permanent Resident was hopeless, but she may well have been the victim of discrimination by virtue of her dismissal, which was likely impelled at least in part by racial animus, albeit her line manager imputed to her an ethnicity that was not, in fact, hers. B's case was done less well, and a surprising number of candidates were innocent to the fact that sexual orientation is not a protected category under Hong Kong's anti-discrimination regime. B's complaint about not being able to read Chinese was simply ignored by many candidates.

Most candidates showed an awareness of the role of the Equal Opportunities Commission, and correctly identified this to be a question on anti-discrimination legislation. More work needs to be done, however, to wean weak candidates off pre-packaged responses, and to encourage them to engage in a sensible manner with legislative materials. This message needs to be passed on to service providers preparing candidates for the exam.

Question 4

This question was the least popular, being attempted by only 23 of the 69 candidates who sat the exam. It also had a low pass rate of 48%.

The question was divided into two parts. In the first part (worth 9 marks), candidates were expected to identify possible criminal offences from the three scenarios stated in the question. These involved potential offences relating to restrictions on freedom of expression under both the National Security Law and ss. 9-10 Crimes Ordinance (Cap. 200). Credit was also given to candidates who made sensible suggestions about any possible offences under other laws or ordinances.

Since the National Security Law is explicitly stipulated in the syllabus, candidates are expected to be aware of its provisions. Similarly, since Part 3 of the syllabus includes "Restrictions on Rights and Freedoms", candidates should also be aware of the restrictions contained in ss. 9-10 Crimes Ordinance. Nonetheless since, unlike the National Security Law, the Crimes Ordinance is not separately mentioned in the syllabus, the text of ss. 9-10 was appended to the question for candidates' reference.

There were some good answers to the first part of the question. However a disappointingly large number of candidates made no mention of one of the two laws necessary to answer this part of the question, i.e. either the Crimes Ordinance or, more commonly, the National Security Law. In particular, a significant number of candidates simply regurgitated the text of ss. 9-10 Crimes Ordinance that was appended to the question. While examiners may sometimes assist candidates by appending the text of some potentially relevant statutory provisions to a particular question, it is important for candidates to understand that this does not relieve them of the responsibility to consider what other statutory provisions and/or case law may also be relevant and never automatically assume that the question can be answered solely by regurgitating any provisions which have been presented to them together with the question.

The second part (worth 16 marks) required candidates to consider possible defences to those offences which had been identified in the first part of the question. Since candidates were informed that the suspect did not deny participating in any of the potentially unlawful activities outlined in the question, this meant (as was clearly signposted in the question) considering the prospects for successfully challenging the constitutionality of some or all of these offences, and almost all candidates successfully identified this point.

This part of the question was designed to test candidates' understanding of the difference between the constitutionality of the National Security Law (which the Court of Final Appeal held in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33 can not be challenged in the Hong Kong courts) and the constitutionality of ss. 9-10 of the Crimes Ordinance (which can be challenged in the same way as other ordinances).

Once again there were some excellent answers. However those candidates who had failed to identify either the Crimes Ordinance or, more commonly, the National Security Law as relevant to the first part of the question once again ran into difficulties by continuing to fail to make any mention of one of these two laws in answering the second part of the question.

Question 5

This question was very popular, being attempted by 67 of the 69 candidates who sat the exam. It had a pass rate of 81%.

The question asked candidates to prepare a briefing note explaining the application of Article 158 of the Basic Law.

Part 1 (worth 15 marks) required candidates to 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. Candidates were to justify their response with reference to provisions of the Basic Law and caselaw. At a minimum, candidates should have explained 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 expected to critique this judgment. This involved an analysis of the Court's central claim that Articles 13 and 19 were excluded provisions, and that the case could not be resolved without a determination of the questions of interpretation affecting the meaning of these provisions. Candidates generally performed adequately in describing these conditions and citing relevant caselaw, although few excelled.

Part 2 (carrying 10 marks) required candidates to explain the powers of interpretation under the Basic Law respectively of the Court of Final Appeal and the NPCSC. They were to justify their response with reference to provisions of the Basic Law and caselaw. In particular, candidates were to consider evolving judicial perceptions as to the scope of their interpretive power, including 'excluded provisions'. In particular, the CFA initially argued that it is the body responsible for determining whether or not the provision to be interpreted falls within the competence of the Region or of the CPG: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, [91]. However, the substantive effects of this claim are limited, given the CFA's subsequent acceptance of the NPCSC's plenary authority to issue Interpretations: *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300. Candidates were to explain the court's reasoning on the NPCSC's plenary power of interpretation.

Candidates generally performed adequately in answering this part of the question, although very few excelled. A minority of candidates misunderstood the question, focusing on the limits of judicial review more generally or only on the power of one body instead of both.