

OLQE Examiners' Comments 2024

Head VI: Hong Kong Constitutional Law

Question 1

This question was the second most popular, being attempted by 132 of the 137 candidates who sat the exam. It had a pass rate of 82%.

Drawing on specific provisions in the Basic Law and Hong Kong National Security Law, the question asked about the legal and constitutional status of the HKSAR under the Basic Law and the Chinese Constitution and required a good understanding of both points.

In Part 1, which was worth five marks, candidates need to explain that the relationship between the PRC and the HKSAR is a relationship between the whole and the part, and the HKSAR is an inalienable part of it in the sense that the HKSAR cannot be separated or seceded from the PRC. In Part 2, which was also worth five marks, candidates were expected to display an understanding of the meaning of the term “local administrative region” in Article 12 of the Basic Law, usually by reference to the different types of local administrative units listed in Articles 30-31 of the PRC Constitution 1982. In Part 3, candidates were expected to display a thorough understanding of the implications of the statement in Article 12 that the HKSAR shall “come directly under the Central People’s Government”. Since this required a thorough understanding of specific provisions in the Hong Kong Basic Law on the powers of the Central Authorities (e.g. Articles 17(3), 18, 158, 159) it was afforded ten marks. Finally in Part 4, which was again worth five marks, candidates were expected to explain how the HKSAR is different from other local administrative units in the PRC, including noting how the HKSAR enjoys a higher degree of autonomy than even National Autonomous Areas.

Most candidates did have a general understanding of the issues needed to answer the four parts of this question and were therefore able to pass. However in many cases it was clear that their knowledge of Chinese constitutional law was rather general and superficial. Nor did most candidates have a good overall understanding of the relationship between the Basic Law and the PRC Constitution, which limited the marks they could achieve.

Question 2

This question was the most popular, being attempted by all 137 candidates who sat the exam. It had the second highest pass rate, at 88%.

Part 1, carrying 15 marks, asked candidates to draft a memo on the arguments for describing Hong Kong as based on a separation of powers model and the arguments for describing Hong Kong as an executive-led system, and that relevant legal authority should be cited where appropriate.

This question was well answered by most candidates. Good answers cited specific articles of the Basic Law and case law in support of both sides of the argument. These were not marked as a checklist, but the omission of key provisions could result in marks being deducted, e.g. where Basic Law articles guaranteeing judicial independence were not cited. Answers were sometimes not balanced, usually with more focus on the separation of powers and disproportionately less on an executive-led system, without any justification for that being offered. A substantial number of candidates characterised the executive-led system as a defunct feature of colonial governance in Hong Kong, rather than furnishing evidence for its continued existence, or for a plausible argument that it continues to exist in some form. Some answers lacked any citation of specific Basic Law articles that supported the argument for a separation of powers and/or for an executive-led system; more often the latter was lacking, but sometimes both. A number of candidates also failed to make the final step in tying the two parts of the question together; the best answers added a few lines at the end which do so. The strongest answers tended to recognise that a separation of powers model and an executive-led system are not mutually exclusive.

Part 2, carrying 10 marks, asked candidates to write a memo explaining the limitations on the role and powers of the Chief Executive over the Legislative Council and the Judiciary, and that relevant legal authority should be cited where appropriate.

This question was generally very well answered by most candidates. Strong answers gave a balanced answer across both parts of the question. Various Basic Law provisions could be cited as part of the answer to the first part of the question, such as Articles 52 and 73, with explanation. It could also have been argued that the Legislative Council retains the ultimate power over the existence and extent of any legislative powers delegated to the Chief Executive. Provisions such as Articles 85 and 88 of the Basic Law could be cited in support of the second part of the question, with explanation, in addition to an explanation of the role of constitutional judicial review. Some candidates misread the question and commented on what powers the Chief Executive has over the legislature and judiciary, rather than the limitations on such powers as the question asked. A number of candidates gave a substantial answer to limitations on the powers of the Chief Executive over the legislature, but then gave little or no answer to the part on limitations on the powers of the Chief Executive over the judiciary. Some candidates did not comment on judicial appointments as part of their answer to this question and it was expected that this should receive comment.

Question 3

This question was relatively less popular, being attempted by 83 out of the 137 candidates who sat the exam. However it had the highest pass rate, at 90%.

The question is loosely based on the Government-mandated destruction of hamsters and other rodents at a pet shop in Causeway Bay during the height of the Covid-19 public health crisis. It is a question about constitutional judicial review, although it touches more generally upon the principle and procedure of public law in Hong Kong.

The mean standard of answers this year was very high, with many exceptional, comprehensive, and well-written responses evidencing a high degree of familiarity with the material and maturity of legal reasoning. An unusually high number of scripts attracted marks of 80+ and the very best came close to earning full marks. Credit was awarded for: (1) constitutional law analysis with reference to encroachment on basic rights; (2) substantive assessment of amenability to judicial review (whether constitutional or otherwise, as some stronger candidates considered whether the Notice itself could be *Wednesbury* unreasonable); (3) attempts to construe the (fictional) Ordinance in its context and the Notice; and (4) sensible and practical consideration of remedies.

Most candidates correctly understood that this was a constitutional judicial review questions and accordingly attempted it in a clear, structured, and reasoned manner. Better candidates made astute and apposite preliminary observations on whether the Notice was *ex facie* valid, querying whether BB was the right person to sign it. Most candidates made a fair to excellent attempt at applying the *Hysan* approach. In the main they (probably correctly) concluded – despite several valiant attempts to save Silver from the needle – that AA was unlikely to get her cat back alive. Most candidates correctly identified this as a serious encroachment on AA’s right to property.

More ambitious rights-based arguments ranged from the right to life (for Silver) to the only slightly less fanciful proposition that the right to family life should be read as including domestic pets. Those positions might, in length of time, reveal themselves to be prescient, but for the time being are somewhat strained. Candidates are reminded to put their better points first, and then, if there is time and if it is relevant, canvass alternative approaches.

Some candidates, even stronger ones, however, tended to miss or treat superficially AA’s best point: the financial prejudice that she would suffer if Silver were destroyed without proper financial compensation – that is, the HK\$4,000 standard award being plainly unsatisfactory and tantamount to confiscatory. Constitutional law engages many noble principles, which are the foundations of a free and pluralistic society. Nevertheless, a pragmatic approach is sometimes warranted in advising the client. Candidates should not be reticent in suggesting, as they would in actual practice, alternative remedies and solutions, which, whilst not optimal, nevertheless go some way to righting the wrong their client has suffered.

Some candidates also failed properly to deal with the margin of appreciation point when there were plenty of marks available for a sensible discussion of the same. There is an argument to be made that the Notice itself is defective in that it does not evidence any detailed reasons on the part of the Department (e.g., why no alternative exercise in discretion was canvassed) and is presented, imperiously, as being unappealable. BB has, to adopt the colourful language of one candidate, gone for the “nuclear option” of destroying Silver on short notice without (apparently) evaluating whether less irreversible solutions could be found, such as quarantine.

That said, given that the facts state that this is a public health emergency, the Notice is, at least in its substantive outcome as regards Silver, probably lawful and the public health implications of the Virus, as understood by the Department that has the expertise to assess such things, a sufficient basis to warrant Silver being destroyed. That is, of course, without prejudice to any discussion on damages/reasonable compensation, which is probably the best AA could expect.

Finally, some candidates, ambitiously, wanted to strike down s.44 or the whole Ordinance itself. In teaching judicial review, emphasis should be placed on distinguishing the contents of the specific provision and/or decision that the applicant seeks to impugn from the Ordinance in which the provision is contained or from which the impugned decision derives.

Fortunately, there were very few instances of ‘info-dumps’ from notes, without reference to the facts. It is unacceptable to reproduce verbatim the contents of course notes and hope to pick up a couple of marks here and there without any attempt to engage with the facts. Such answers attracted zero or, at best, one or two nominal marks to the extent that the law cited was relevant to the question.

One candidate, whose answer was otherwise very strong, made a startling suggestion in the conclusion that AA take Silver out of Hong Kong to avoid enforcement of the Notice. It is assumed that this was an innocent mistake. However, it is important that candidates be reminded that they can never advise a client to do something that is unlawful in Hong Kong, even if that appears to be in the client’s best interest.

Question 4

This question was relatively popular, being attempted by 123 of the 137 candidates who sat the exam. However, it had the lowest pass rate, at 61%.

The question asked candidates to prepare a briefing note that explains, in two parts: (1) the purpose, scope and circumstances in which the courts will suspend a declaration of unconstitutionality, or otherwise order a declaration of temporary validity (worth 15 marks); and (2) the purpose, scope and circumstances in which the courts will adopt a remedial interpretation of legislation (worth 10 marks).

In Part 1, candidates needed to identify and evaluate, with examples, the use of the suspended declaration and temporary validity order. Their purpose should be identified as being to uphold the rule of law and to avoid a legal lacuna. Other purposes include to provide the legislature with the opportunity to address a legal issue on a more comprehensive basis than the court could order. However, candidates should also have acknowledged that these are extraordinary orders and not the norm, given the requirement that the court must uphold the Basic Law in the event of any inconsistencies. Candidates should then have delved into some of the caselaw that address this tension, such as on covert surveillance, transgender recognition, or same-sex civil unions.

While there were many satisfactory answers to this question, there were also a sizeable number of failures largely due to candidates writing answers on irrelevant topics, such as the scope of constitutional jurisdiction.

In Part 2, candidates needed to explain the purpose, scope and use of remedial interpretations, with concrete examples. A remedial interpretation is a means to preserve the validity of the offending statutory provision while also giving effect to constitutionally protected rights. Candidates might have in this regard differentiated between the interpretive techniques of reading down, reading in and striking out language in legislation – with examples from the case law. Candidates needed to also consider the scope of remedial interpretation and the circumstances where it is not possible to adopt such an interpretation. In doing so, candidates needed to discuss cases where a remedial interpretation has been applied.

While there were many satisfactory answers in which candidates generally provided relevant answers, there were also a significant number of failures due to candidates lacking examples/application.

Question 5

This question was the least popular, being attempted by 67 of the 137 candidates who sat the exam. It also had the second lowest pass rate, at 75%.

The question was intended to cover interpretation and amendment of the Basic Law and posited a proposal to restrict voting rights to Chinese citizens. Candidates were asked to advise on the interpretation and possible amendment of art 26 of the Basic Law (which guarantees voting rights to an extent) in order to implement such a restriction. Specifically they were asked to cover:

- (a) the proper interpretation of art 26;
- (b) the power of the NPCSC to interpret art 26; and
- (c) how to go about amending art 26 if thought necessary.

The question was marked leniently. This is because a day-one solicitor would probably not be asked to deal on his or her own with a highly specialised field like constitutional interpretation and amendment.

Most candidates were able to set out the general principles of constitutional interpretation and amendment, and the pass rate was acceptable. However, many of the answers were very general and did not focus on the particular question. The examiner got the distinct impression that some candidates were copying from pre-prepared answers (which they were entitled to bring into the examination room, this being an open-book exam) without applying their minds or adapting their answers to the question posed.

Such candidates were generally awarded bare passes or slightly higher. Few candidates achieved high marks for superior answers. This is a pity because, given the marking system, higher marks on a question the candidate knows well can compensate for lower marks on other questions.

Some candidates were obviously unfamiliar even with the basic principles, and unfortunately had to be failed.

Reflecting on the answers as a whole, the examiner would say that the overall performance of candidates was adequate, but not much better.